8

No. 90-368-CFX
Status: GRANTED

Title: Sheldon Baruch Toibb, Petitioner
v.
Stuart J. Radloff

Docketed:
August 2, 1990

Court: United States Court of Appeals
for the Eighth Circuit

Counsel for petitioner: Belsky,Jonathan W., Dyk,Timothy B.

Counsel for respondent: Radloff,Stuart J., Solicitor General

40 nonconforming copies recd. 8/2; 40 conforming copies recd. 8/30.

Entry	Date	Note	Proceedings and Orders
1	Aug 2 1990	G	Petition for writ of certiorari filed.
2	Sep 17 1990		Waiver of right of respondent Stuart J. Radloff to respond filed.
3	Sep 19 1990		DISTRIBUTED. October 5, 1990
4	Sep 27 1990	P	Response requested -- JPS. (Due October 27, 1990)
5	Oct 15 1990		REDISTRIBUTED. October 26, 1990
6	Oct 26 1990		Resonse requested from the United States Trustee. Due on or before November 26, 1990.
8	Nov 15 1990		Order extending time to file response to petition until December 26, 1990.
9	Dec 21 1990		Order further extending time to file response to petition until January 2, 1991.
10	Jan 2 1991		REDISTRIBUTED. January 18, 1991
11	Jan 2 1991	X	Brief of respondent United States filed.
12	Jan 18 1991		Petition GRANTED.
			**********
13	Feb 27 1991		SET FOR ARGUMENT MONDAY, APRIL 22, 1991. (4TH CASE)
14	Mar 4 1991		Joint appendix filed.
15	Mar 4 1991		Brief of petitioner Toibb filed.
16	Mar 4 1991		Brief of respondent Stuart Radloff in support of petition filed.
17	Mar 8 1991	G	Motion of the Solicitor General for divided argument filed.
18	Mar 11 1991		Record filed.
		*	Certified copy of C.A. Proceedings received.
19	Mar 18 1991		Motion of the Solicitor General for divided argument GRANTED.
20	Mar 22 1991		CIRCULATED.
22	Apr 1 1991	X	Brief amicus curiae of James Hamilton filed.
21	Apr 2 1991		Record filed.
		*	certified copy of original record.
23	Apr 15 1991	X	Reply brief of petitioner Toibb filed.
24	Apr 22 1991		ARGUED.

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90-368

No.

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1990

In Re:
SHELDON BARUCH TOIBB

Petitioner,

STUART J. RADLOFF, Trustee,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

SHELDON BARUCH TOIBB
8640 Olive Boulevard
Suite A
University City, Missouri
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Pro Se

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QUESTION PRESENTED

IS AN INDIVIDUAL NON-BUSINESS DEBTOR ELIGIBLE FOR REORGANIZATION RELIEF UNDER CHAPTER 11 OF THE UNITED STATES BANKRUPTCY CODE?

PARTIES

Petitioner Sheldon Baruch Toibb is an individual debtor who has filed for reorganization under Chapter 11 of the United States Bankruptcy Code, 11 U.S.C., Chapter 11. Petitioner's Chapter 11 case was dismissed, sua sponte, by the United States Bankruptcy Court for the Eastern District of Missouri by reason of his alleged ineligibility for Chapter 11 reorganization relief.

Respondent Stuart J. Radloff is the appointed trustee in petitioner's original bankruptcy case. He has been cited herein as a nominal respondent, although the dismissal order being appealed from herein was neither initiated by him or by any adverse party, nor defended by any party throughout the lower appellate court proceedings.

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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1990

In Re:
SHELDON BARUCH TOIBB
Petitioner,

STUART J. RADLOFF, Trustee,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Petitioner, Sheldon Baruch Toibb, prays that a Writ of Certiorari issue to the United States Court of Appeals for the Eighth Circuit to review the judgment of the Court below which judgment affirmed the dismissal of petitioner's Chapter 11

reorganization case.

OPINIONS BELOW

This opinion of the United States Court of Appeals for the Eighth Circuit is appended hereto as Appendix A. The order denying petitioner's Petition for Rehearing en banc is appended hereto as Appendix B. To petitioner's knowledge, neither the opinion nor the order have yet been reported. The orders and opinions of the District Court and the Bankruptcy Court are appended hereto respectively as Appendices C and D.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on May 2, 1990, affirming the Bankruptcy Court's dismissal order of August 1, 1988. The Court of Appeals denied a timely motion for rehearing en banc on June 8, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

Petitioner raises issues with respect to his claimed statutory right to seek reorganization under Chapter 11 of the United States Bankruptcy Code (Title 11 U.S.C.). Section 109 of the Code, which sets forth the eligibility requirements for relief under the various chapters of the Code provides, in pertinent part:

"§109. Who may be a debtor

.....

(b) A person may be a debtor under chapter 7 of this title only if such person is not-

(1) a railroad;

(2) a domestic insurance company, bank, savings bank, cooperative bank, savings and loan association, building and loan association, homestead association, credit union, or industrial bank or similar institution which is an insured bank as defined in section 3(h) of the Federal Deposit Insurance Act (12 U.S.C. 1813(h); or

(3) a foreign insurance company, bank, savings bank, cooperative bank, savings and loan association, building and loan association, homestead association, or credit union, engaged in such business in the United States.

.....

(d) Only a person that may be a debtor under chapter 7 of this title, except a stockbroker or a commodity broker, and a

railroad may be a debtor under chapter 11 of this title."

STATEMENT OF THE CASE

This case originated under the jurisdiction of the United States Bankruptcy Court for the Eastern District of Missouri pursuant to 28 U.S.C. §1334, 151 and 157 and Local Rule 29 of the United States District Court for the Eastern District of Missouri. Petitioner Sheldon Baruch Toibb (hereinafter referred to as the "Debtor") filed a Voluntary Chapter 7 petition on November 18, 1986. On October 2, 1987, upon Debtor's motion and by leave of Court, Debtor converted his case to one under Chapter 11 of the Code. Thereafter, on March 8, 1988, the Bankruptcy Court, sua sponte entered an Order to show cause why the Debtor's Chapter 11 case should not be dismissed

for failure to qualify as a Chapter 11 debtor.

A show cause hearing was subsequently held, during which the Debtor was questioned by both counsel and Court as to his economic and business related activities. Following the hearing, the Court issued its finding that the Debtor was not engaged in any "ongoing business which satisfies the Chapter 11 eligibility requirements as delineated in the Eighth Circuit's Wamsganz case" and hence not eligible for Chapter 11 reorganization. (See Appendix D, Memorandum Opinion.) Although Debtor contended that Chapter 11

relief is not limited to business debtors[1], the Court nevertheless dismissed his reorganization case.

Said dismissal order was thereupon appealed to both the United States District Court for the Eastern District of Missouri and subsequently to the Eighth Circuit Court of Appeals, wherein the dismissal orders were subsequently affirmed.

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1. Debtor has also maintained in all prior Court proceedings that he was, in fact, engaged in business. However, for the purposes of this petition, Debtor concedes that the Bankruptcy Court's finding will not be set aside and that, therefore, he would be considered a non-business debtor by the Court.

REASONS FOR GRANTING THE WRIT

This case provides the Court with an excellent and expedient opportunity to resolve a conflict between several of the Circuit Courts of Appeals as to whether an individual, non-business debtor, who would otherwise qualify as a Chapter 7 debtor under the Bankruptcy Code, is also eligible to seek a Chapter 11 Reorganization. Although the statutory language of §109(d) seems fairly straightforward as to the question of who would qualify, several Courts have gone beyond the literal language of that section and have concluded that individuals not engaged in business are ineligible. Wamsganz v. Boatmen's Bank of DeSoto, 804 F.2d 503, 505 (8th Cir., 1986).

The Wamsganz decision is based upon the Eighth Circuit's analysis of the legislative history underlying the Bankruptcy Reform Act of 1978, Pub. L. 95-598. The Eighth Circuit's analysis of that history led the court to conclude that although there is no explicit language in the Bankruptcy Code limiting the use of Chapter 11 to only those debtors not engaged in business, it was nevertheless Congress' intent to exclude non-business debtors from eligibility. As such, the Eighth Circuit had few reservations in holding that non-business debtors are not eligible for Chapter 11.

The Eleventh Circuit Court of Appeals has taken a contrary view on the issue of non-business debtor eligibility. In In re Moog, 774 F.2d 1073 (11th Cir., 1985), the Court unequivocally held that non-business

debtors are entitled to seek relief under Chapter 11.

The Court recognized that although Congress contemplated that Chapter 11 would be primarily used by business debtors, it did not enact or intend to enact statutory language which deprived non-business debtors of eligibility.

The Moog holding has been followed by numerous bankruptcy and district courts. See e.g. In re Little Creek Development Co., 779 F.2d 1068, 1073 (5th Cir., 1986); In re Russell, 60 B.R. 42 (Bkrtcy. W.D. Ark., 1985); In re Markunes, 78 B.R. 875 (Bkrtcy. S.D. Ohio, 1987); In re McStay, 82 B.R. 42 (Bkrtcy. E.D. Pa., 1988); Grundy Natl. Bank v. Short, 80 B.R. 802 (W.D. Va., 1987). Additionally, the Ninth Circuit Court of Appeals' Bankruptcy Appellate Panel has also, in effect,

adopted the Moog decision in its dicta in Warner v. Universal Guardian Corporation, 30 B.R. 528 (BAP 9th Cir., 1983). Thus, a genuine conflict exists between the Circuit Courts of Appeal as to the eligibility of non-business debtors for Chapter 11.

The importance of resolving this conflict is encompassed by both practical and theoretical aspects. Unlike many intercircuit conflicts which may often deal with issues of a procedural or evidentially nature, this case touches on the availability of a substantive statutory remedy to a presumably large class of persons.

If the Court herein does not see fit to grant Certiorari, the denial of Certiorari would leave debtors in many parts of the country with a statutory

bankruptcy remedy that debtors in other circuits do not have. The existence or nonexistence of that remedy is a factor which each and every attorney practicing in the field of bankruptcy law must take into account in advising his client, particularly those who may be ineligible for Chapter 13 relief or cannot formulate a feasible plan within the constraints of that chapter of the Bankruptcy Code. The issue presented herein is certainly one which has been oft discussed in affected legal circles. See e.g. "Consumer Chapter 11 Proceedings: Abuse or Alternative?", 91 Commercial Law Journal 234 (1986). It is one which lacks the burdensome complexity of many issues brought before this Court, and as such, could seemingly be resolved once and for all by the Court in an expedient and

unequivocal manner. Above all, it would put all debtors across the country on a uniform plane.

For the foregoing reasons, petitioner respectfully submits that this Court should issue its Writ of Certiorari both to correct the conflict that exists between the Circuits regarding the availability of Chapter 11 to non-business debtors and to correct the Eighth Circuit's erroneous declaration and interpretation of the law as stated in Wamsganz.

CONCLUSION

For all of the above reasons, petitioner respectfully submits that this Court's Writ of Certiorari should issue to review the decision of the Eighth Circuit.

Respectfully submitted,

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Pro Se

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 89-2120

In re Sheldon Baruch Toibb, Debtor	* On Appeal from * the United * States District * Court for the * Eastern District * of Missouri
Sheldon Baruch Toibb, Appellant	* (PUBLISHED)

Submitted: April 12, 1990

Filed: May 2, 1990

Before ARNOLD, Circuit Judge, ROSS, Senior Circuit Judge, and FAGG, Circuit Judge.

PER CURIAM.

Sheldon Baruch Toibb appeals the District Court's affirmance of the Bankruptcy Court's order dismissing his petition for reorganization under Chapter 11 of the Bankruptcy Code. We affirm.

Mr. Toibb filed a petition in bankruptcy under Chapter 7 of the Code in November of 1986. He then filed a motion to convert his bankruptcy proceeding to one under Chapter 11 eleven months later, and the Bankruptcy Court[1] granted the motion. On March 8, 1988, the Court issued an order to show cause why debtor's case should not be dismissed for Mr. Toibb's failure to qualify as a Chapter 11

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[1]The Hon. Barry S. Schermer, United States Bankruptcy Judge for the Eastern District of Missouri.

debtor. The Court, after holding a hearing on the matter, found that debtor was not engaged in an ongoing business, as required to qualify for Chapter 11 relief under Wamsganz v. Boatmen's Bank of DeSoto, 804 F.2d 503 (8th Cir. 1986). It then ordered debtor to convert his case back to a Chapter 7 proceeding within 10 days, or the case would be dismissed. Mr. Toibb then appealed the Bankruptcy Court's decision to the District Court,[2] where the decision was affirmed.

Mr. Toibb now appeals to this Court from the District Court's affirmance. He

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[2]The Hon. Stephen M. Limbaugh, United States District Judge for the Eastern and Western Districts of Missouri.

argues that the Bankruptcy Court erred (1) in dismissing his case sua sponte, without any such request from his creditors, (2) alternatively, by holding that Chapter 11 relief is available to businesses only; and (3) by finding that he was not engaged in an ongoing business for the purposes of eligibility under Chapter 11. We conclude that the Bankruptcy Court did have authority to dismiss the proceeding sua sponte, and that the Bankruptcy Court was controlled by Wamsganz, 804 F.2d 503. We can also find no error in the Bankruptcy Court's finding that Mr. Toibb did not qualify as a business entitled to Chapter 11 protection.

Affirmed. See 8th Cir. R. 47B.

A true copy.

Attest:

CLERK, U.S. COURT OF
APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 89-2120EM

In Re:	*
	* Order Denying
Sheldon Baruch Toibb,	* Petition for
Appellant	* Rehearing with
	* Suggestion for
	* Rehearing
	* En Banc

Appellant's suggestion for rehearing en banc has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc.

Petition for rehearing by the panel is also denied.

June 8, 1990

Order Entered at the Direction of the Court:

/ss/ Robert D. St. Vrain
Clerk, U.S. Court of Appeals,
Eighth Circuit.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

In Re:	)	
	)	
SHELDON BARUCH TOIBB,	)	No. 88-2026 C (5)
	)	
Debtor.	)	

ORDER

In accordance with the Memorandum filed today,

IT IS HEREBY ORDERED that the Order of the United States Bankruptcy Court for the Eastern District of Missouri dismissing Debtor's Reorganization Case under Chapter 11 of the Bankruptcy Code is AFFIRMED.

Dated this 19th day of May, 1989.

/ss/ Stephen Limbaugh
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

In Re:	)	
	)	
SHELDON BARUCH TOIBB,	)	No. 88-2026 C (5)
	)	
Debtor	)	

MEMORANDUM

This cause is before the Court on the appeal of Debtor Sheldon B. Toibb from an order of the United States Bankruptcy Court for the Eastern District of Missouri.[1] On August 1, 1988, the

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1 The Honorable Barry S. Schermer, United States Bankruptcy Judge for the Eastern District of Missouri.

bankruptcy court entered an order giving Debtor 10 days to convert his case from a Chapter 11 proceeding to one under Chapter 7 of the Bankruptcy Code. Upon Debtor's refusal to convert the case, the court ordered the case dismissed. Debtor appeals the bankruptcy court's decision, arguing that the court did not have the authority to dismiss the case sua sponte or, alternatively, that the court improperly dismissed his case because he had two ongoing businesses that qualified for protection under Chapter 11. This Court has appellate jurisdiction of bankruptcy matters pursuant to 28 U.S.C. § 158(a).

The bankruptcy court's findings of fact are not to be overturned unless they are clearly erroneous. Bankr. R. 8013. Its conclusions of law, however, are subject to de novo review. In re Martin,

761 F.2d 472, 474 (8th Cir. 1985). The facts of this case are set forth fully in Judge Schermer's memorandum opinion. Briefly, Debtor was a 24% shareholder and a consultant to Independence Electric Corporation (IEC), a business engaged in the production and marketing of hydroelectric power. In April of 1985, Debtor's consultancy was terminated. Debtor attempted to continue as a consultant for other businesses in the energy field, but without much success.

In November of 1986, Debtor filed a Chapter 7 petition, apparently upon the belief that his stock in IEC was worthless. Debtor claims that in 1987 he learned that IEC was an ongoing business and he hoped to become a consultant once again. In addition to Debtor's work as an energy consultant, he has been retained as a fund raiser by at least three charitable

organizations since May of 1987. Debtor's fund raising agreements typically provided that he would receive a fixed percentage of the funds he raised, usually 10 to 20 percent. Debtor disputes the bankruptcy court's finding that he received full reimbursement for any expenses he incurred in connection with the fund raising.

A motion to convert the case to one under Chapter 11 was made and granted on October 2, 1987. On March 8, 1988, Judge Schermer issued an order to show cause why Debtor's Chapter 11 case should not be dismissed for Debtor's failure to qualify as a Chapter 11 Debtor. After a hearing on the matter, Judge Schermer ruled that Debtor did not qualify as a Chapter 11 Debtor because he was not engaged in an ongoing business as required by Wamsganz v. Boatmen's Bank of DeSoto, 804 F.2d 503,

505 (8th Cir. 1986). This appeal followed the bankruptcy court's decision.

Debtor first challenges the bankruptcy court's authority to dismiss the case sua sponte. Prior to November 1986, there was a dispute among bankruptcy courts whether the court had the inherent power to dismiss a case sua sponte. See In re Moog, 46 B.R. 466, 468 (Bankr. N.D. Ga. 1985); In re Cricker, 46 B.R. 229 (Bankr. N.D. 1985); In re Warner, 30 B.R. 528 (9th Cir. BAP 1983). In 1986, Congress amended section 105(a) of the Bankruptcy Code to express its intent not to exclude the court from acting when a provision calls for action by a "party in interest." Section 105(a) now reads:

> The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an

> issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of discretion.

11 U.S.C. § 105(a).

The amendment became effective November 26, 1986. Since that date, the courts are in agreement that the authority of a bankruptcy court to dismiss or convert a Chapter 11 case sua sponte is absolute. In re Bayou Self, Inc., 73 B. R. 682 (Bankr. W.D. La. 1987); In re Rubenstein, 71 B.R. 777 (9th Cir. BAP 1987). Therefore, Debtor's contention that the court erred in dismissing his Chapter 11 case sua sponte is without merit.

Debtor's second argument is that his case should not have been dismissed because he had two ongoing businesses that

qualified him as a Chapter 11 Debtor. The bankruptcy court's determination that Debtor was not engaged in a business under the Wamsganz standard is subject to review under the clearly erroneous standard. The bankruptcy court considered Debtor's argument that he engaged in two businesses: energy consulting and fund raising. The court noted that Debtor had not performed energy consulting services at least since October 2, 1987, the date Debtor's case was converted to a Chapter 11 proceeding. The court's ruling recognizes that the mere possibility of performing those services in the future is not enough to constitute an ongoing business. Similarly, the court determined that Debtor's fund raising endeavors were only a temporary occupation and that it did not qualify as a business under Chapter 11. The bankruptcy court's

determination that Debtor was not engaged in an ongoing business which satisfied the Chapter 11 eligibility requirements as set forth in the Wamsganz case was not clearly erroneous. The opinion of the bankruptcy court dismissing Debtor's Chapter 11 case must be affirmed.

Dated this 19th day of May, 1989.

/ss/ Stephen Limbaugh
UNITED STATES DISTRICT JUDGE

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

In re	)	
	)	
SHELDON BARUCH TOIBB,	)	Case No. 86-02881-BSS
	)	
Debtor	)	

At Saint Louis, in this District, this 1st day of August, 1988.

For the reasons set forth in the Memorandum Opinion issued this date, it is hereby

ORDERED that Sheldon Baruch Toibb, the Debtor in this case, shall be granted ten (10) days from the date of this Order to reconvert this case to one under Chapter 7 of the Bankruptcy Code.

IT IS FURTHER ORDERED that if no such conversion is received within the ten (10) day period, this case shall be dismissed.

/ss/ Barry S. Schermer
BARRY S. SCHERMER
UNITED STATES BANKRUPTCY JUDGE

Copy mailed to:

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Debtor
8640 Olive Boulevard - Apt. A
St. Louis, Missouri 63132

Audrey G. Fleissig
Attorney for Debtor
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St. Louis, Missouri 63101

Stuart J. Radloff
Trustee
7777 Bonhomme Avenue - 14th Floor
Clayton, Missouri 63105

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

In re	)	
	)	
SHELDON BARUCH TOIBB,	)	Case No.
	)	86-02881-BSS
Debtor	)	

MEMORANDUM OPINION

INTRODUCTION

Sheldon Baruch Toibb, (hereinafter the "Debtor"), filed a Voluntary Chapter 7 Petition on November 18, 1986. On October 2, 1987, the Debtor moved and was allowed to convert his case to one under Chapter 11 of the Bankruptcy Code. On March 8, 1988, this Court entered an Order to show cause why the Debtor's Chapter 11 case should not be dismissed for failure to qualify as a Chapter 11 debtor. At the hearing of this matter the Debtor and Debtor's counsel appeared.

JURISDICTION

This Court has jurisdiction over the parties and subject matter of this proceeding pursuant to 28 U.S.C. §1334, 151 and 157 and Local Rule 29 of the United States District Court for the Eastern District of Missouri. This is a "core proceeding" which the Court may hear and determine pursuant to 28 U.S.C. §157(b)(2)(A) and (O).

FACTS

The Debtor received his Bachelor of Arts degree in Political Science from Yeshiva University in 1972. In 1975 he received his Juris Doctor degree from Washington University; and in 1976 he received a Master of Law degree from Georgetown University. From 1976 through 1980 the Debtor was engaged in the private practice of law. In 1980 he joined the Office of General Counsel of the Federal

Energy Regulatory Commission (hereinafter "FERC").

Independence Electric Corporation (hereinafter "IEC"), was formed in March, 1983 for the purpose of producing and marketing electric power. The Debtor is a 24% shareholder of the issued stock in the company. Pursuant to a letter agreement dated March 15, 1983, the Debtor was retained as a consultant to IEC earning an annual fee of $50,000.00 plus a $1,735.00 monthly expense allowance. After working at the IEC offices in 1983, the Debtor worked out of his home beginning in January of 1984 and in April of 1985 the consulting agreement was terminated.

From April of 1985 to July of 1986 the Debtor sought other consulting work in the energy field and attempted to find a "white knight" to acquire IEC and reinstate the consulting agreement.

During the period of time between April, 1985 and September 1986, the Debtor had three sources of income: 1) his parents, who provided his primary support from May 1986 to May 1987; 2) his friends; and 3) payments received in June of 1985 from consulting work performed from IEC in March and April of 1985. In July of 1986 the Debtor moved to St. Louis and on November 18, 1986 he filed a Voluntary Chapter 7 Petition. A Motion To Convert the Debtor's case to one under Chapter 11 was made and granted on October 2, 1987.

Beginning in May of 1987, the Debtor was retained as a fund raiser by the St.Louis Rabbinical College. His compensation is 20% of all amounts raised, plus his expenses. Since January, 1988 the Debtor has also been retained as a fund raiser for the The Food Bank and Jerry S. Stein Charities, Inc., and is to

be paid 10% of all amounts raised, plus his expenses.

The Debtor's schedules reflect that he has debts totaling $141,819.97, of which $137,619.34 are unsecured. The Debtor's testimony further revealed that approximately one-third of his total debt was incurred in connection with his work at IEC or his education.

DISCUSSION

The issue presented in this case is whether Sheldon Baruch Toibb is an eligible debtor under the provisions of Chapter 11 of the Bankruptcy Code. The eligibility of a Chapter 11 Debtor has been addressed by several United States Appellate Courts including the Eighth Circuit. Although the Eleventh Circuit Court of Appeals has allowed in certain circumstances debtors not engaged in business to seek relief in a Chapter 11

proceeding, (In re Moog, 774 F.2d 1073 (11th Cir. 1985); the Fifth, Sixth and Eighth Circuits have rejected this position. In the case of Wamsganz vs. Boatmen's Bank of DeSoto, 804 F.2d 503, 505 (8th Cir. 1986) the Eighth Circuit Court of Appeals held that Chapter 11 was designed to affect business rehabilitation and therefore "persons not engaged in business may not seek relief under Chapter 11 of the Bankruptcy Code". This Court must apply the position of the Wamsganz Court with respect to Chapter 11 eligibility.

In the case sub judice the Debtor agues that he is engaged in two "businesses": energy consulting and fund raising. Although the Debtor has performed energy consulting services in the past for IEC, (which services have not been performed since 1985) he was neither

engaged as an energy consultant on October 2, 1987, the date this case was converted to a Chapter 11 proceeding; nor has he performed any such services since the conversion of the case. Thus, under the standard recited by the Wamsganz Court, energy consulting would not provide a sufficient basis for a determination of eligibility under Chapter 11.

Addressing the Debtor's secondary "business" of fund raising, this Court similarly finds an insufficient basis for a finding of Chapter 11 eligibility. Pursuant to the Debtor's testimony it is this Court's understanding that his fund raising endeavors comprise only a temporary occupation and do not constitute the "business" which the Debtor is seeking to reorganize within the context of this Chapter 11 proceeding. As the schedules and the testimony indicate the debts

sought to be satisfied by this Chapter 11 case were incurred primarily in connection with the Debtor's energy consulting services for IEC and the Debtor's education. The fund raising "business" which the Debtor claims a desire to reorganize had not even begun on the date of the Chapter 7 filing, and had begun only 5 months prior to the conversion to Chapter 11. The debts outstanding in this case bear no connection to the Debtor's fund raising endeavors, and were incurred prior to the Debtor engaging in fund raising. Additionally, because the Debtor's compensation for his fund raising activities includes a percentage fee for what he raises on top of a total reimbursement for all of his expenses, the Debtor cannot incur any additional debt in connection with his fund raising "business", thus making it an unlikely

Chapter 11 reorganization candidate. Since the Debtor has no office, no employees, no known business assets or liabilities and incurs no expenses which are not reimbursed; he has failed to demonstrate that there is a "business" to reorganize, and how such a reorganization could be effected.

Based upon the evidence and testimony presented in this case, this Court believes that this Debtor wishes to employ the Chapter 11 process to enable him to resume his energy consulting work in connection with IEC. Because, however, the Debtor is not currently engaged in the business of energy consulting, and because his current occupation of fund raising is completely unrelated to the over $140,000.00 of debt involved in this case (and is not the entity sought to be reorganized herein), this Court finds no

ongoing business which satisfies the Chapter 11 eligibility requirements as delineated in the Eighth Circuit's Wamsganz case. An Order consistent with this Memorandum Opinion requiring the Debtor to either convert the case to one under Chapter 7 of the Bankruptcy Code or face dismissal shall be issued simultaneously herewith.

/ss/ Barry S. Schermer
BARRY S. SCHERMER
UNITED STATES BANKRUPTCY JUDGE

Dated: August 1, 1588
St. Louis, Missouri

Copy mailed to:

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Stuart J. Radloff
Trustee
7777 Bonhomme Avenue - 14th Floor
Clayton, Missouri 63105

IN THE SUPREME COURT OF THE UNITED STATES

In Re:	)
	)
SHELDON BARUCH TOIBB	)
	)
Petitioner,	)
	)
	)
	)
STUART J. RADLOFF, Trustee,	)
	)
Respondent.	)

AFFIDAVIT OF SERVICE

I, SHELDON BARUCH TOIBB, hereby state under penalty of perjury that three (3) copies of petioner's Petition for Writ of Certiorari in the cause hereinabove were mailed by me, First Class, postage prepaid, this 28th day of August, 1990, to Stuart J. Radloff, Esq., 7777 Bonhomme, 14th Floor, Clayton, Missouri 63105.

Sheldon Baruch Toibb

STATE OF MISSOURI)
)
ST. LOUIS COUNTY)

Subscribed and sworn to before me this 28TH day of August, 1990.

Jonathan Belsky
Notary Public

My Commission Expires:

JONATHAN BELSKY
NOTARY PUBLIC STATE OF MISSOURI
ST. LOUIS COUNTY
MY COMMISSION EXP. FEB. 16,1991

(2)

No. 90-368

In the Supreme Court of the United States

OCTOBER TERM, 1990

SHELDON BARUCH TOIBB, PETITIONER

v.

STUART J. RADLOFF

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT

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Washington, D.C. 20534

QUESTION PRESENTED

Whether a debtor must be engaged in an ongoing business in order to seek reorganization relief under Chapter 11 of the Bankruptcy Code, 11 U.S.C. 1101 *et seq.*

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TABLE OF AUTHORITIES

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-368

SHELDON BARUCH TOIBB, PETITIONER

v.

STUART J. RADLOFF

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT

This brief is filed in response to the Court's letter dated October 26, 1990, requesting James S. Cole, Assistant United States trustee, to file a response to the petition.[1]

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. A2-A6, is reported at 902 F.2d 14. The opinions of the district court, Pet. App. A9-A16, and the bankruptcy court, Pet. App. A19-A28, are unreported.

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[1] The United States trustee did not participate in the proceedings below. His status as a respondent is authorized by 11 U.S.C. 307, which provides that "[t]he United States trustee may raise and may appear and be heard on any issue in any case or proceeding under this title * * *." Alternatively, this brief may be viewed as one filed by the United States as *amicus curiae*.

JURISDICTION

The judgment of the court of appeals was entered on May 2, 1990. A petition for rehearing was denied on June 8, 1990. Pet. App. A7. The petition for a writ of certiorari was filed on August 2, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Bankruptcy Code offers debtors different remedies under its different Chapters. For example, Chapter 7 of the Code authorizes liquidations; Chapter 11, reorganization; and Chapter 13, adjustment of the debts of an individual with regular income. Most debtors qualify for relief under more than one Chapter. The debtor's choice of a particular Chapter is determined by the cost of its proceedings and the scope of relief it provides.[2]

In this case, petitioner—an individual debtor—sought to reorganize under Chapter 11. The bankruptcy court dismissed his petition on the authority of *Wamsganz* v. *Boatmen's Bank of De Soto*, 804 F.2d 503 (8th Cir. 1986), which held that "persons not engaged in business may not seek relief under Chapter 11 of the Bankruptcy Code." *Id.* at 505. The district court and the court of appeals affirmed the dismissal on the same basis.

1. Beginning in March 1983, petition was employed as a consultant by the Independence Electric Corporation (IEC)—a company formed in 1983 to produce and market electric power. IEC terminated petitioner's consulting agreement in April 1985. Between April 1985 and September 1986, petitioner sought other consulting work related to the energy industry, with little success. He relied primarily on income from his parents and friends and from payments related to his previous consulting work at IEC. In July 1986, petitioner moved to St. Louis, Missouri. On November 18, 1986, he filed a voluntary Chapter 7 (liquidation) petition in the United States Bankruptcy Court for the Eastern District of Missouri. Pet. App. A19-A22.

On October 2, 1987, petitioner was permitted to convert his Chapter 7 petition to one under Chapter 11 (reorganization). On March 8, 1988, however, the bankruptcy court *sua sponte* entered an order directing petitioner to show cause why his petition should not be dismissed for failure to qualify as a Chapter 11 debtor. After a hearing, the bankruptcy court found that petitioner was not engaged in an ongoing business[3] and, in view of the holding in *Wamsganz* v. *Boatmen's Bank of De Soto*, *supra*, that Chapter 11 is limited to business debtors, dismissed the petition. Pet. App. A19, A24-A25, A27-A28.

2. On appeal, the district court found no basis to disturb the bankruptcy court's finding that petitioner

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[2] For a brief survey of some of the factors that may enter into this complex decision, see Herbert, *Consumer Chapter 11 Proceedings: Abuse or Alternative?*, 91 Com. L.J. 234, 239-240 (1986).

[3] The bankruptcy court found that petitioner was not engaged as an energy consultant on the date he converted his Chapter 7 petition to one under Chapter 11 or at any time thereafter. Pet. App. A25. Although petitioner also contended that he was engaged in the business of raising funds for nonprofit organizations, the bankruptcy court determined that petitioner's "fund raising endeavors comprise only a temporary occupation and do not constitute the 'business' which the Debtor is seeking to reorganize." *Ibid.* Petitioner does not seek review of the question whether he is engaged in an ongoing business. Pet. 7 n.1.

"was not engaged in an ongoing business" and affirmed that court's dismissal of petitioner's case on the authority of *Wamsganz*. Pet. App. A16. In a brief *per curiam* opinion, the court of appeals likewise concluded that petitioner "did not qualify as a business entitled to Chapter 11 protection" and that "the Bankruptcy Court was controlled by *Wamsganz*." *Id.* at A5. The petition to rehear the case en banc was denied. *Id.* at A7.

DISCUSSION

The courts of appeals disagree whether a debtor must be engaged in an ongoing business to be eligible for relief under Chapter 11 of the Bankruptcy Code. Although no statistics report the number of non-business debtors who seek relief under Chapter 11, an analysis of lower court decisions suggests that the number may be significant. Because non-business debtors typically lack the means (and their creditors the financial motivation) to litigate before this Court, this case presents an appropriate and unusual opportunity to achieve uniformity on this important issue throughout the circuits.

1. The decision of the Eighth Circuit below rests on its earlier decision in *Wamsganz* v. *Boatmen's Bank of De Soto*, 804 F.2d 503 (1986), which disagreed with the decision of the Eleventh Circuit in *In re Moog*, 774 F.2d 1073 (1985) (per curiam). In *Wamsganz*, the Eighth Circuit acknowledged that "Chapter 11 contains no explicit limitation excluding persons not engaged in business," 774 F.2d at 504, but nonetheless held that a married couple not engaged in a business could not seek relief under Chapter 11 because the "legislative history of the Bankruptcy Code, taken as a whole, shows that Congress meant for chapter 11 to be available to businesses and persons engaged in business, and not to consumer debtors," *id.*

at 505.[4] The Eighth Circuit declined to reconsider *Wamsganz* in this case. Pet. App. A5, A7.

The Eighth Circuit in *Wamsganz* rejected the analysis of the Eleventh Circuit in *In re Moog*, 774 F.2d 1073 (1985) (per curiam). 804 F.2d at 505. The Eleventh Circuit in *Moog* held that although "Chapter 11 is primarily aimed at business debtors, consumer debtors might find Chapter 11 appropriate under certain circumstances." 774 F.2d at 1074. It noted that Section 109(d) of the Bankruptcy Code, 11 U.S.C. 109(d)—which identifies the debtors eligible for relief under Chapter 11—does not require operation of an ongoing business. 774 F.2d at 1075. Instead, Section 109(d) provides that a Chapter 11 debtor may be anyone who may proceed under Chapter 7, and with exceptions not relevant here, Chapter 7 is available to any person other than a railroad or specified financial institution. See 11 U.S.C. 109(d). The Eleventh Circuit also relied on the following passage from a committee report discussing Chapter 11:

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[4] The Eighth Circuit cited the decisions of the Fifth and Sixth Circuit Courts of Appeals for the proposition that "persons who are not engaged in business may not seek relief under chapter 11" of the Bankruptcy Code. *Wamsganz*, 804 F.2d at 503 (citing *In re Little Creek Development Co.*, 779 F.2d 1068 (5th Cir. 1986) and *In re Winshall Settler's Trust*, 758 F.2d 1136 (6th Cir. 1985)). *Little Creek* and *Winshall Settler's Trust*, however, were not filed by individual debtors hoping to persuade the bankruptcy court that they should be permitted to retain assets by pledging future nonbusiness income. Although *Little Creek* and *Winshall Settler's Trust* differ from the Eleventh Circuit's approach, the Fifth and Sixth Circuits were not called upon to answer the precise question presented here. See *In re Markunes*, 78 Bankr. 875, 879 (Bankr. S.D. Ohio 1987) (*Winshall* does not prohibit Chapter 11 relief to a non-business debtor).

> Chapter 11, Reorganization, is primarily designed for businesses, although individuals are eligible for relief under the chapter. The procedures of chapter 11, however, are sufficiently complex that they will be used only in a business case and not in the consumer context.

S. Rep. No. 989, 95th Cong., 2d Sess. 3 (1978); see *Moog*, 774 F.2d at 1074. As the Eleventh Circuit observed, the Senate Report expressly recognizes that non-business debtors are eligible for relief under Chapter 11. *Ibid.*[5]

2. The conflict between the Eighth and Eleventh Circuits over the availability of Chapter 11 relief to non-business debtors is of sufficient practical importance to warrant review by this Court. Although no statistics report the number of non-business debtors who seek relief under Chapter 11,[6] the reported decisions of the lower courts suggest that such debtors do so with some frequency. Compare, *e.g.*, *In re*

[5] The Eleventh Circuit also observed that Chapter 11 was designed to bring together into one type of proceeding those cases that had been eligible for reorganization under Chapters X, XI, and XII of the Bankruptcy Code of 1898, which had been available to individuals. 774 F.2d at 1075. In addition, the Eleventh Circuit noted that Official Form No. 7, which is a financial statement form for a debtor not engaged in business, is expressly referenced for possible use in Chapter 11 proceedings under Bankruptcy Rule 1007(b). *Ibid.*

[6] The 1989 *Annual Report of the Director of the Administrative Office of the United States Courts* counts 1,986 "non-business filings" under Chapter 11 of the Bankruptcy Code for the twelve months ending June 30, 1989. *Id.* at 362. The Report does not make clear whether this figure includes filings by individual non-business debtors or filings by all individuals (whether or not they are engaged in an ongoing business).

Bryan, 104 Bankr. 554, 558-559 (Bankr. D. Mass. 1989) (allowing non-business petition under Chapter 11); *In re Cook*, 98 Bankr. 624, 626 (Bankr. D. Mass. 1989) (same); *In re Silverstein*, 94 Bankr. 284, 289 (Bankr. E.D.N.Y. 1988) (same); *In re McStay*, 82 Bankr. 763, 767 (Bankr. E.D. Pa. 1988) (same); *In re Fernandez*, 97 Bankr. 262, 263 (Bankr. E.D.N.C. 1989) (same); *Grundy National Bank* v. *Shortt*, 80 Bankr. 802, 805 (W.D. Va. 1987) (same); *In re Gregory*, 39 Bankr. 405, 409 (Bankr. M.D. Tenn. 1984) (same); *In re Markunes*, 78 Bankr. 875, 879 (Bankr. S.D. Ohio 1987) (same), with *e.g.*, *In re Ponn Realty Trust*, 4 Bankr. 226, 231 (Bankr. D. Mass. 1980) (dismissing non-business petition under Chapter 11); *In re Bendig*, 74 Bankr. 47 (Bankr. D. Conn. 1987) (same); *In re Lange*, 75 Bankr. 154 (Bankr. N.D. Ohio 1987) (same); *In re Roland*, 77 Bankr. 265 (Bankr. D. Mont. 1987) (same).

It is true that a non-business debtor's Chapter 11 petition, like any other, may be dismissed for "cause" under 11 U.S.C. 1112(b), and that the absence of an ongoing business will often constitute "cause" for believing that the debtor cannot effectuate a reorganization under 11 U.S.C. 1112(b)(2). But the notion that reorganization plans supported by an ongoing business are more likely to be viable than are plans without such support is no reason to deny Chapter 11 reorganization to all non-business debtors. In many cases, an individual debtor will be able to pledge non-business assets or income to fund a viable plan. Compare *Moog*, 774 F.2d at 1075, with Pet. App. A26-A28. Moreover, if speculation that a class of debtors is unlikely to succeed were sufficient warrant to deny reorganization relief, then *no* debtor should be en-

titled to proceed under Chapter 11 because also 90% of such reorganization attempts fail.[7]

While the number of persons potentially affected by this issue is large, the number of cases presenting it to this Court is not. Non-business debtors, by definition, are litigants with only marginal means. Not many will be in a position to appeal the dismissal of their Chapter 11 petitions for lack of an ongoing business. By the same token, it will be unusual that a disgruntled creditor will have enough at stake to appeal the denial of a dismissal in this context.

3. At the same time, and perhaps for the same reasons, it must be noted that the progress of this case to this Court has been somewhat unusual. The bankruptcy court dismissed petitioner's Chapter 11 petition *sua sponte*. Although the United States trustee was served with petitioner's briefs, he did not oppose petitioner's appeals of the dismissal of his case. Nor did any creditor defend the bankruptcy court's dismissal. In sum, no adversary proceedings were held before the district court or the court of appeals.

The federal government—the only respondent before this Court, see p. 1 & note 1, *supra*—is of the view that the lower courts erred in concluding that Chapter 11 is limited to debtors engaged in an ongoing business. Section 109 of the Bankruptcy Code,

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[7] Eighty-three percent of cases filed under Chapter 11 do not result in a confirmed plan; of the 17% that do, only two-thirds of those cases (or 11% of the total) achieve successful reorganizations. E. Flynn, *A Statistical Analysis of Chapter 11* (Oct. 1989) (unpublished study conducted by the Bankruptcy Division of the Administrative Office of the United States Courts).

which defines those debtors eligible for Chapter 11 relief, does not exclude non-busines debtors. The legislative history supports the natural inference to be drawn from the silence of the statute. The Senate Report expressly recognizes that non-business debtors "are eligible for relief under the chapter." S. Rep. No. 989, *supra*, at 3. The legislative history collected by the Eighth Circuit in *Wamsganz*, 804 F.2d at 505, merely reflects the anticipated function of Chapter 11 as a "single chapter for all business reorganizations," S. Rep. No. 989, *supra*, at 9, and Congress' expectation that the expense and complexity of Chapter 11 proceedings would discourage non-business debtors. It does not foreclose Chapter 11 relief for non-business debtors.

CONCLUSION

We believe that the question presented warrants this Court's review, in light of the conflict between the Eighth and Eleventh Circuits and the frequency with which the issue appears to arise. At the same time, only two courts of appeals have ruled on the issue, and the total lack of adversary proceedings below—and the absence of any party supporting the judgment before this Court—may counsel in favor of awaiting another case presenting the question. If the Court does decide to grant review, it might wish to appoint counsel to defend the judgment below. *Mathews* v. *Weber*, 423 U.S. 261, 265 n.2 (1976); *Granville-Smith* v. *Granville-Smith*, 348 U.S. 885, 885-886 (1954), 349 U.S. 1, 4 (1955).

Respectfully submitted.

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No. 90-368

In the Supreme Court of the United States

OCTOBER TERM, 1990

SHELDON BARUCH TOIBB, PETITIONER

v.

STUART J. RADLOFF

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether a debtor must be engaged in an ongoing business in order to seek reorganization relief under Chapter 11 of the Bankruptcy Code, 11 U.S.C. 1101 *et seq.*

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OPINIONS BELOW

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JURISDICTION

The judgment of the court of appeals was entered on May 2, 1990. A petition for rehearing was denied on June 8, 1990. Pet. App. A7. The petition for a writ of certiorari was filed on August 2, 1990, and was granted on January 22, 1991. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 109 of the Bankruptcy Code (11 U.S.C.) provides in pertinent part as follows:

> Who may be a debtor
>
> * * * * *
>
> (b) A person may be a debtor under chapter 7 of this title only if such person is not—
>
> (1) a railroad;
>
> (2) a domestic insurance company, bank, savings bank, cooperative bank, savings and loan association, building and loan association, homestead association, credit union, or industrial bank or similar institution which is an insured bank as defined in section 3(h) of the Federal Deposit Insurance Act (12 U.S.C. 1813(h)); or
>
> (3) a foreign insurance company, bank, savings bank, cooperative bank, savings and loan association, building and loan association, homestead association, or credit union, engaged in such business in the United States.
>
> * * * * *
>
> (d) Only a person that may be a debtor under chapter 7 of this title, except a stockholder or a commodity broker, and a railroad may be a debtor under chapter 11 of this title.

STATEMENT

The Bankruptcy Code offers debtors different remedies under its different Chapters. Most debtors qualify for relief under more than one Chapter. The debtor's choice of a particular Chapter is determined by the cost of proceedings under it and the remedies it provides.

In this case, petitioner—an individual debtor—sought to reorganize under Chapter 11. The bankruptcy court dismissed his petition on the authority of *Wamsganz* v. *Boatmen's Bank of De Soto*, 804 F.2d 503, 505 (8th Cir. 1986), which held that "persons who are not engaged in business may not seek relief under Chapter 11 of the Bankruptcy Code." The district court and the court of appeals affirmed the dismissal on the same basis.

1. Beginning in March 1983, petitioner was employed as a consultant by the Independence Electric Corporation (IEC), a company formed in 1983 to produce and market electric power. IEC terminated petitioner's consulting agreement in April 1985. Between April 1985 and September 1986, petitioner sought other consulting work related to the energy industry, with little success. He subsisted primarily on money from his parents and friends and from payments related to his previous consulting work at IEC. In July 1986, petitioner moved to St. Louis, Missouri. On November 18, 1986, he filed a voluntary Chapter 7 (liquidation) petition in the United States Bankruptcy Court for the Eastern District of Missouri. Pet. App. A19-A22.

In connection with his Chapter 7 petition, petitioner filed standard schedules of assets and liabilities. As liabilities, petitioner identified a disputed federal tax priority claim of $11,000 and unsecured claims of $170,605. Schedules of Assets and Liabilities, Schedule A-1 and A-3 (Oct. 30, 1986). As assets, petitioner listed 400 shares of IEC stock and a "possible claim against business associates for breach of duty," both having a value "unknown." *Id.*, Schedule B-2. Otherwise, petitioner presented what bankruptcy practitioners refer to as a "no asset" case—*i.e.*, a case in which the debtor has no assets worth

liquidating.[1] Petitioner listed no income from employment; his Statement of Current Income and Expenditures (Oct. 30, 1986) indicated that his living expenses (estimated at $661 per month) were paid for by a "loan from parents."

On August 6, 1987, the Chapter 7 trustee, respondent Stuart J. Radloff, notified the creditors and other parties in interest that he had received an offer of $25,000 for petitioner's IEC stock from IEC's Board of Directors. J.A. 13-14. On August 25, 1987, the law firm of Dickstein, Shapiro & Morin, a scheduled creditor, objected to the sale on the ground that the offer was not lawfully tendered because it was "not made by a Board of Directors of IEC legally constituted." Objection to Sale of Debtor's Stockholdings in Independence Electric Corporation at 1. The creditor also objected that, "in light of imminent events which will significantly affect the value of the corporation's shares, the offer is premature and the amount offered woefully inadequate." *Ibid.*

2. On September 21, 1987, petitioner filed a motion to convert to Chapter 11 (reorganization) pursuant to 11 U.S.C. 706(a), J.A. 15-16, and objected to the trustee's proposed stock sale, *id.* at 17-20. Petitioner explained that, at the time he filed for relief under Chapter 7, he believed the IEC stock to be worthless. *Id.* at 18. After he filed his Chapter 7 petition, however, IEC was granted an exclusive license to develop hydroelectric power by the Federal

[1] Petitioner also listed assets of $20 cash, furniture valued at $100, clothing and other personal possessions valued at $250, and a used car worth $1000. Schedule of Assets and Liabilities, Schedule B-2 (Oct. 30, 1986). Except for petitioner's $500 equity in the used car, those items were excluded from the property of the estate by 11 U.S.C. 522 and Mo. Ann. Stat. § 513.430 (Vernon 1952 & Supp. 1990) J.A. 12.

Energy Regulatory Commission. *Ibid.* Although petitioner acknowledged that the IEC stock's value was still "highly speculative," he "now believes that IEC may have some value." *Ibid.* For that reason, petitioner "now believes that this case is an appropriate case for reorganization under Chapter 11" where "the debtor is entitled to deal with the assets * * * pursuant to a plan of reorganization." *Ibid.*

On October 2, 1987, the conversion was allowed, J.A. 21-23, and, on February 1, 1988, petitioner filed a Plan of Reorganization, *id.* at 70-82. In that Plan, petitioner proposed to pay 100% of all administrative, priority, and tax claims. *Id.* at 75-76. Petitioner offered to pay the remaining (unsecured) creditors $25,000, less the administrative, tax, and priority claims. *Id.* at 76; see *id.* at 77 (estimating those claims).[2] In addition, petitioner proposed to pay the unsecured creditors 50% of any dividends or other distributions from IEC, up to full payment of the debts, for six years. *Id.* at 76, 77-78. In a proposed Disclosure Statement, also filed on February 1, 1988, petitioner explained that the $25,000 would be obtained by means of an unsecured loan, to be repaid from debtor's personal income and his 50% interest in future IEC distributions under the proposed plan. *Id.* at 94. Petitioner explained that IEC had obtained several exclusive licenses from the Federal Energy Regulatory Commission to construct and operate hydroelectric projects. *Id.* at 96-97. Petitioner admitted that IEC had financial problems, and that its future was "uncertain." *Id.* at 97. But since the $25,000 distribution in petitioner's plan was equal to

[2] In the schedules filed with petitioner's Chapter 11 petition, the tax claim has been reduced to $4,200.63 and the total unsecured claims to $137,619.34. J.A. 64.

the offer the trustee received for the IEC stock, and since the reorganization plan promised the creditors 50% of future proceeds from that stock, "the Plan of Reorganization proposes a payout to creditors of an amount at least equal to what the creditors would receive in a liquidation with the possibility of a greater return if the IEC Stock earns a dividend or if [petitioner] sells the IEC Stock within the next 6 years." *Id.* at 99.

3. On March 8, 1988, the bankruptcy court *sua sponte* entered an order directing petitioner to show cause why his petition should not be dismissed for failure to qualify as a Chapter 11 debtor. After a hearing, the bankruptcy court found that petitioner was not engaged in an ongoing business [3] and, in view of the holding in *Wamsganz* v. *Boatmen's Bank*, 804 F.2d 503 (8th Cir. 1986) that Chapter 11 is limited to business debtors, dismissed the petition. Pet. App. A19, A24-A25, A27-A28.

4. On appeal, the district court found no basis to disturb the bankruptcy court's finding that petitioner "was not engaged in an ongoing business" and affirmed that court's dismissal of petitioner's case on the authority of *Wamsganz*. Pet. App. A16. In a brief *per curiam* opinion, the court of appeals likewise concluded that petitioner "did not qualify as a business entitled to Chapter 11 protection" and that "the Bankruptcy Court was controlled by *Wamsganz*." *Id.* at A5. The petition to rehear the case en banc was denied. *Id.* at A7.

[3] The bankruptcy court found that petitioner was not engaged as an energy consultant on the date he converted his Chapter 7 case to one under Chapter 11 or at any time thereafter. Pet. App. A25. Although petitioner also contended that he was engaged in the business of raising funds for nonprofit organizations, the bankruptcy court determined that petitioner's "fund raising endeavors comprise only a temporary occupation and do not constitute the 'business' which the Debtor is seeking to reorganize." *Ibid.* Petitioner does not seek further review of the question whether he is engaged in an ongoing business. Pet. 7 n.1.

SUMMARY OF ARGUMENT

The Bankruptcy Code defines with some precision the various categories of debtors eligible for relief under the different Chapters of the Code. With certain exceptions not relevant here, the Code specifies that "a person that may be a debtor under chapter 7 * * * may be a debtor under chapter 11." 11 U.S.C. 109(d). Chapter 7, in turn, specifies that "[a] person may be a debtor under chapter 7 * * * only if such person is not" one of a number of listed entities, such as an insurance company, bank, or savings and loan association. 11 U.S.C. 109(b). There is no dispute that petitioner is not one of the precluded entities listed in the statute. Since petitioner "may be a debtor under chapter 7," by the unambiguous language of the statute he also "may be a debtor under chapter 11." 11 U.S.C. 109(d).

The court below added another prerequisite to Chapter 11 relief not set forth in the statute, that the debtor be engaged in an ongoing business. The court, as it put it in a prior opinion, thought that "[t]he legislative history of the Bankruptcy Code, taken as a whole, shows Congress meant for chapter 11 to be available to businesses and persons engaged in business, and not to consumer debtors." *Wamsganz* v. *Boatmen's Bank of De Soto*, 804 F.2d 503, 505 (8th Cir. 1986). The court explained that "[t]he provisions of chapter 11 substantiate this reading of the legislative history." *Ibid.* This is exactly back-

wards. Courts should not seek the meaning of statutes in the legislative history, and then check to see if the actual provisions of the statute "substantiate" that reading. Proper analysis begins with the provisions of the statute, and where—as here—the statute is clear and unambiguous, that is where the analysis ends, as well. See, *e.g.*, *Business Guides, Inc.* v. *Chromatic Communications Enters, Inc.*, No. 89-1500, slip op. 7 (Feb. 26, 1991); *Hallstrom* v. *Tillamook County*, 110 S. Ct. 304, 308 (1990); *Sullivan* v. *Stroop*, 110 S. Ct. 2499, 2502 (1990).

In any event, the legislative history confirms that "individuals are eligible for relief under the chapter [11]." S. Rep. No. 989, 95th Cong., 2d Sess. 3 (1978). Petitioner's attempt to reorganize is also consistent with Congress's preference, reflected in 11 U.S.C. 706(a) and 707(b) of the Bankruptcy Code, to encourage reorganizations rather than liquidations. In a liquidation proceeding under Chapter 7, petitioner's stock would have been sold, possibly at a distress price, and his unsecured creditors would have received only a token payment on their claims. Under the reorganization plan petitioner proposed in Chapter 11, the unsecured creditors were to receive the same cash payment on part of their claims; in addition, those creditors and petitioner were to share equally in the future income (if any) generated by petitioner's stock. In sum, the reorganization plan proposed benefits to petitioner and his creditors.

Petitioner's attempt to reorganize rather than liquidate should not be automatically foreclosed. Petitioner is eligible for Chapter 11 reorganization under 11 U.S.C. 109(d); that Section omits any requirement that debtors be engaged in an ongoing business. Petitioner's attempt to reorganize, like that of most business debtors, may not succeed. But the

Bankruptcy Code should not be construed to bar the attempt.

ARGUMENT

CHAPTER 11 REORGANIZATION IS AVAILABLE TO DEBTORS WITHOUT REGARD TO WHETHER THEY ARE ENGAGED IN AN ONGOING BUSINESS

The decision of the Eighth Circuit below rests on its earlier decision in *Wamsganz* v. *Boatmen's Bank of De Soto*, 804 F.2d 503, 505 (1986), which held that "persons who are not engaged in business may not seek relief under Chapter 11 of the Bankruptcy Code." The Eleventh Circuit in *In re Moog*, 774 F.2d 1073 (1985) (per curiam), reached the opposite conclusion, relying primarily upon the language of the Bankruptcy Code and its legislative history. *Id.* at 1074-1075. In our view, the Eleventh Circuit is correct. Section 109(d) of the Bankruptcy Code (11 U.S.C.) plainly authorizes individual debtors who are not engaged in an ongoing business to reorganize under Chapter 11. The legislative history supports this interpretation. The policy arguments that prompted the *Wamsganz* court to limit Chapter 11 relief to business debtors are flawed; even if they had some merit, they would not dictate restrictions on eligibility for bankruptcy relief beyond those enacted by Congress.

A. Section 109(d) Of The Bankruptcy Code Allows Debtors To Seek Relief Under Chapter 11 Without Regard To Whether They Are Engaged In An Ongoing Business

"As [the Court] ha[s] repeatedly noted, the starting point for interpreting a statute is the language of the statute itself." *Hallstrom* v. *Tillamook County*, 110 S. Ct. 304, 308 (1990) (internal quota-

tion marks and citations omitted); see *Pennsylvania Dep't of Public Welfare* v. *Davenport*, 110 S. Ct. 2126, 2130 (1990) (applying to Bankruptcy Code "the fundamental canon that statutory interpretation begins with the language of the statute itself"). "If the statute is clear and unambiguous, that is the end of the matter, for the court * * * must give effect to the unambiguously expressed intent of Congress." *Sullivan* v. *Stroop*, 110 S. Ct. 2499, 2502 (1990) (internal quotations and citations omitted); see *Business Guides, Inc.* v. *Chromatic Communications Enters., Inc.*, No. 89-1500, slip op. 7 (Feb. 26, 1991) (With a rule "[a]s with a statute, our inquiry is complete if we find the text * * * to be clear and unambiguous."); *Sullivan* v. *Everhart*, 110 S. Ct. 960, 964 (1990). Courts "are not at liberty to create an exception"—or impose an additional requirement—"where Congress has declined to do so." *Hallstrom* v. *Tillamook County*, 110 S. Ct. at 309. To do so "creates too great a risk that the Court is exercising its own 'WILL instead of JUDGMENT,' with the consequence of 'substitut[ing] [its own] pleasure to that of the legislative body.' The Federalist No. 78, p. 469 (C. Rossiter ed. 1961) (A. Hamilton)." *Public Citizen* v. *United States Dep't of Justice*, 109 S. Ct. 2558, 2575 (1989) (Kennedy, J., dissenting).

The Bankruptcy Code identifies five types of bankruptcy proceedings, each assigned a different Chapter. Eligibility for relief under each Chapter is governed by Section 109 of the Code. Section 109(d) makes Chapter 11 reorganization available to all debtors who qualify for liquidation under Chapter 7, with the addition of railroads (which are excluded under Chapter 7), and with the express exception of

certain brokers.[4] In turn, Section 109(b) permits any "person" to apply for Chapter 7 relief except a railroad, insurance company, bank or other financial institution.[5] It is clear that both Chapter 11 reorganization and Chapter 7 liquidation are very broadly available remedies, subject only to a few, specifically enumerated limitations. A requirement that a debtor be engaged in an ongoing business is simply not one of them.

Comparing the wide availability of Chapter 11 reorganization (and Chapter 7 liquidation) with the more restrictive eligibility requirements for relief under Chapters 9, 12, and 13 of the Bankruptcy Code demonstrates that Congress spelled out limitations on access to particular forms of bankruptcy relief in the text of the Code itself. For example, only an insolvent municipality may seek relief under Chapter 9, "Adjustment of Debts of a Municipality."

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[4] Section 109(d) provides: "Only a person that may be a debtor under chapter 7 of this title, except a stockbroker or a commodity broker, and a railroad may be a debtor under Chapter 11 of this title."

[5] Section 109(b) provides:

> A person may be a debtor under chapter 7 of this title only if such person is not—
>
> (1) a railroad;
>
> (2) a domestic insurance company, bank, savings bank, cooperative bank, savings and loan association, building and loan association, credit union, or industrial bank or similar institution which is an insured bank or similar institution whch is an insured bank as defined by section 3(h) of the Federal Deposit Insurance Act * * *; or
>
> (3) a foreign insurance company, bank, savings bank, cooperative bank, savings and loan association, building and loan association, or credit union, engaged in such business in the United States.

11 U.S.C. 109(c). "Only a family farmer with regular annual income may be a debtor under chapter 12." 11 U.S.C. 109(f). And "[o]nly an individual with regular income," unsecured debts of less than $100,000, and secured debts of less than $350,000, may proceed as a debtor under Chapter 13, "Adjustment of Debts of an Individual With Regular Income." 11 U.S.C. 109(e).

The case for judicial imposition of an "ongoing business" requirement on Section 109(d) presupposes a gross omission by Congress when it drafted the Bankruptcy Code. The contrary inference—that Congress enumerated whatever restrictions it intended on the availability of various remedies in the Bankruptcy Code itself—is more plausible. The reticulated limitations on eligibility for relief under Chapters 9, 12, and 13 provide convincing evidence that Congress would have excluded non-business debtors from Section 109(d) expressly if it had intended to do so. Cf. *e.g.*, *Omni Capital Int'l* v. *Rudolf Wolff & Co.*, 484 U.S. 97, 106 (1987); *INS* v. *Hector*, 479 U.S. 85, 89 (1986); *NLRB* v. *Action Automotive, Inc.*, 469 U.S. 490, 497 (1985).

B. The Legislative History Of The Bankruptcy Code Indicates That Chapter 11 Is Available To Individual Debtors Whether Or Not They Are Engaged In An Ongoing Business

When the language of a statute is clear, as it is in this case, courts should be chary of mining the legislative history for a contrary legislative intent. See, *e.g.*, *Dennis* v. *Higgins*, No. 89-1555 (Feb. 20, 1991), slip op. 5 n.4; *Mead Corp.* v. *Tilley*, 109 S. Ct. 2156, 2162 (1989); *Maine* v. *Thiboutot*, 448 U.S. 1, 6 n.4 (1980); *Greenwood* v. *United States*, 350 U.S. 366, 374 (1956). Reliance upon the express language of the statute is particularly important in

cases arising under the Bankruptcy Code, a highly technical, "detailed and calculated statutory scheme." *Lynch* v. *Johns-Manville Sales Corp.*, 710 F.2d 1194, 1198 (6th Cir. 1983); see *United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 240-241 (1989) (stating, in construing the Bankruptcy Code, that "as long as the statutory scheme is coherent and consistent, there generally is no need for a court to inquire beyond the plain language of the statute").

In any event, the legislative history addressing the availability of Chapter 11 to non-business debtors supports the conclusion suggested by the language of Section 109(d)—that individual debtors may reorganize under Chapter 11 without regard to whether they are engaged in an ongoing business. The Senate Report expressly recognizes that non-business debtors "are eligible for relief under the chapter":

> Chapter 11, Reorganization is *primarily* designed for businesses, *although individuals are eligible for relief under the chapter.* The procedures of chapter 11, however, are sufficiently complex that they will be used only in a business case and not in the consumer context.

S. Rep. No. 989, 95th Cong., 2d Sess. 3 (1978) (emphasis added); see *In re Moog*, 774 F.2d at 1074.

The legislative history collected by the Eighth Circuit in *Wamsganz*, 804 F.2d at 505, merely reflects the anticipated function of Chapter 11 as a "single chapter for all business reorganizations," S. Rep. No. 989, *supra*, at 9, and Congress's expectation that the expense and complexity of Chapter 11 proceedings would generally discourage non-business debtors. Cf. *Pension Benefit Guaranty Corp.* v. *LTV Corp.*, 110 S. Ct. 2668, 2677 (1990). It does not embody a "clearly expressed legislative intention" to deny

Chapter 11 reorganization to non-business debtors. See, *e.g.*, *Dennis* v. *Higgins*, No. 89-1555, slip op. 5 n.4; *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 432 n.12 (1987).

C. Allowing Individual, Non-Business Debtors To Reorganize Under Chapter 11 Furthers The Policy Of The Bankruptcy Code To Encourage Reorganization Rather Than Liquidation

The Bankruptcy Code provision permitting a debtor to convert a Chapter 7 case to one under Chapter 11 reflects Congress's preference for reorganization over liquidation. A debtor may convert his Chapter 7 case to a reorganization case under Chapter 11, 12, or 13 "at any time." 11 U.S.C. 706(a). "[T]his section gives the debtor the one-time absolute right of conversion of a liquidation case to a reorganization or individual repayment plan case. * * * The policy of the provision is that the debtor should always be given the opportunity to repay his debts, and a waiver of the right to convert a case is unenforceable." S. Rep. No. 989, *supra*, at 94; accord H.R. Rep. No. 595, 95th Cong., 1st Sess. 380 (1977).

The policy favoring reorganization over liquidation is also manifest in Section 707(b). That Section authorizes the bankruptcy court to dismiss a Chapter 7 case if the debts are primarily consumer debts and the liquidation relief would constitute a "substantial abuse of the provisions of this chapter." In effect, Section 707(b) authorizes denial of liquidation relief in cases where the debtor can pay off a substantial part of his debts by reorganizing. See *In re Krohn*, 886 F.2d 123, 127 (6th Cir. 1989); *In re Walton*, 866 F.2d 981, 983 (8th Cir. 1989); *In re Kelly*, 841 F.2d 908, 914 (9th Cir. 1988).

Reorganization may be preferable not only for creditors, it can also produce a more desirable result than liquidation for the non-business debtor. In the case of *In re Moog*, 774 F.2d 1073 (11th Cir. 1985), for example, reorganization may have allowed the debtors to hold on to their family residence by offering to pledge future, non-business income. *Id.* at 1075. In this case, reorganization may enable the debtor to retain his only investment property.[6]

Indeed, petitioner's attempt to reorganize is consistent with the purposes of Chapter 11. Petitioner had but one asset: 400 shares of IEC stock. If this stock is worthless, as petitioner believed when he filed his Chapter 7 petitioner, a liquidation—which would discharge most of his prepetition debts and give him a "fresh start," S. Rep. No. 989, *supra*, at 3—was the logical course. Petitioner subsequently learned, however, that IEC had obtained exclusive licenses from the Federal Energy Regulatory Commission to build hydroelectric plants. In economic terms, IEC has an option to supply water power—an option that might generate significant income depending on future oil prices. It is true that IEC has not as yet generated earnings. But the $25,000 offer for petitioner's stock and the protest by a creditor that the offer was "woefully inadequate" indicate that the value of petitioner's share of IEC's future earnings could be substantial.

The future earnings represented by petitioner's IEC stock would be shared by petitioner and his creditors, however, only if he is allowed to reorganize under Chapter 11. In a liquidation proceeding under

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[6] Where Chapter 11 relief is inappropriate, the case may be dismissed or converted to one under Chapter 7. See 11 U.S.C. 1112(b).

Chapter 7, the trustee is obligated to reduce the assets to cash for prompt distribution to claimants.[7] In a typical reorganization proceeding under Chapter 11, in contrast, the "debtor in possession" ordinarily retains control of the debtor's assets during the judicial proceedings.[8]

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[7] Under Chapter 7, a trustee is appointed to assume control of the debtor's estate. 11 U.S.C. 701-704. The trustee will wind down the business of the debtor (if necessary), 11 U.S.C. 721, reduce the property of the estate to money "as expeditiously as is compatible with the best interests of the parties in interest," 11 U.S.C. 704(1), and distribute the proceeds to claimants according to the priorities established by the Code, 11 U.S.C. 726. For an individual (but not a corporation), the trustee's distribution will ordinarily result in a discharge of most of the debtor's debts. 11 U.S.C. 727(a), 727(a)(1); cf. 11 U.S.C. 523.

[8] 11 U.S.C. 1107. In contrast to the automatic appointment of a trustee in a liquidation case, a trustee will be appointed in a Chapter 11 proceeding only "for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor * * * or * * * if such appointment is in the interest of creditors, any equity security holders, and other interests of the estate." 11 U.S.C. 1104(a). Under Chapter 11, a reorganization plan will typically be filed by the debtor; if the debtor fails to do so within the 120-day period prescribed by the Code, "[a]ny party in interest" may do so. 11 U.S.C. 1121. The plan must designate classes of claims, specify the manner in which the claims will be adjusted, and provide adequate means for its implementation. 11 U.S.C. 1123(a), 1124. After circulation of a disclosure statement, 11 U.S.C. 1125, and a hearing, 11 U.S.C. 1128, the court exercising bankruptcy jurisdiction may confirm the proposed reorganization plan if the criteria set forth in 11 U.S.C. 1129 are met. Among those criteria is the requirement that each impaired class of claimants must accept the plan or receive "property of a value * * * that is not less than the amount that such holder would receive * * * if the debtor were liquidated under chapter 7." 11 U.S.C. 1129(a)(7).

To be sure, Chapter 13 offers debt-adjustment proceedings that provide much of the relief available under Chapter 11, with streamlined procedures for the "adjustment of debts of an individual with regular income."[9] But Chapter 13's simplified procedures for individuals with regular income were not available to petitioner because he had no regular source of income and his debts exceeded the maximum amount permitted by statute. 11 U.S.C. 109(e). Significantly, Congress did not so limit eligibility to the more generally available reorganization relief under Chapter 11. Cf. *Gozlon-Peretz* v. *United States*, No. 89-7370 (Feb. 19, 1991), slip op. 9 ("[I]t is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."); *General Motors Corp.* v. *United States*, 110 S. Ct. 2528, 2532 (1990) (same).

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[9] The reorganization plan must be filed simultaneously with the petition or within 15 days thereof. Bankruptcy Rule 3015. The debtor must begin payments within 30 days of the filing of the plan. 11 U.S.C. 1326. Ordinarily, the payments under the plan must be completed in three years or less, although the court may extend this period to not more than five years "for cause." 11 U.S.C. 1322(c). In further contrast to a Chapter 11 case, there are no creditors' committees in Chapter 13. Cf. 11 U.S.C. 1102-1103. Whereas in Chapter 11, the debtor enjoys the exclusive right to propose a plan for a limited period of time, 11 U.S.C. 1121, only the debtor may file a plan in Chapter 13, 11 U.S.C. 1321. Unsecured creditors do not vote on the proposed plan; they may object to it or seek post-confirmation modification of the payment schedules. Compare 11 U.S.C. 1129, with 11 U.S.C. 1325, 1329. As in a Chapter 11 case, the Chapter 13 reorganization plan must allow unsecured creditors at least the same recovery as they would receive "if the estate of the debtor were liquidated under chapter 7." 11 U.S.C. 1325(a)(4).

In urging that petitioner's Chapter 11 case be reinstated, we do not offer any view as to whether petitioner's plan is viable—*i.e.*, that the proposed plan sets forth the requisite contents, 11 U.S.C. 1123, or that it should be confirmed, 11 U.S.C. 1129. Such speculation is simply not appropriate in the threshold determination whether petitioner is eligible to reorganize under Chapter 11.[10] The court of appeals' decision imposes an unlegislated barrier to non-business debtors seeking relief under Chapter 11, and an additional burden on the courts to shape the parameters of an "ongoing business" limitation on eligibility for that relief.[11] Deciding whether a Chapter 7 debtor is conducting an "ongoing business" would not be the only difficult inquiry confronting courts in bankruptcy cases, but it is one not required by Congress.

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[10] If speculation that a class of debtors is unlikely to succeed were sufficient warrant to deny initial access to reorganization relief, then *no* debtor should be entitled to proceed under Chapter 11 because almost 90% of such reorganization attempts fail. Statistics indicate that 83% of cases filed under Chapter 11 do not result in a confirmed plan; of the 17% that do, only two-thirds of those cases (or 11% of the total) achieve successful reorganizations. E. Flynn, *A Statistical Analysis of Chapter 11* (Oct. 1989) (unpublished study conducted by the Bankruptcy Division of the Administrative Office of the United States Courts).

[11] The task appears to be particularly difficult, inasmuch as many "businesses" are operated by sole proprietors with "consumer" debts, and perhaps "consumer" assets, which can be significant. Herbert, *Consumer Chapter 11 Proceedings: Abuse or Alternative?*, 91 Com. L.J. 234, 234-35 (1986).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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MARCH 1991

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(4)

No. 90-368

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

SHELDON BARUCH TOIBB,
Petitioner,

vs

STUART J. RADLOFF, TRUSTEE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED AUGUST 2, 1990
CERTIORARI GRANTED JANUARY 18, 1991

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RELEVENT DOCKET ENTRIES

(Complete)

Date of Filing	Proceedings
United States Bankruptcy Court	
11/18/86	Statement of Affairs and Schedules or Chapter 13 Statement.
11/18/86	Appointment of Trustee Trustee's Bond and Order/Trustee's Acceptance
11/25/86	Notice of § 341 Meeting and Certification of Mailing § 341 Date: 12/16/86 § 341 Time: 11:30 A.M. § 341 Location: 10 Chapter 7 (45)
11/18/86	Last date for discharge/dischargeability complaints: 02/16/87 (correction entered: 1/19/88 under Chapter 11). Claims Bar Date 2/16/88 under Chapter 11
12/16/86	§ 341 Meeting Conducted. Discharge entered. Notice of Discharge/Certification of Mailing
12/10/86	Trustee Final Report ☐ No asset ☐ Assets (Correction entered: set aside.)
12/22/86	Good faith review had.
03/25/87	Trustee's application to set aside order of no distribution filed.
03/26/87	Trustee's application to set aside no distribution SO ORDERED by Judge.
03/27/87	Discharge entered.
03/27/87	Notice of Discharge/Certificate of Mailing (44)

Date of Filing	Proceedings
06/02/87	Trustee's petition to employ counsel filed and granted.
	Affidavit of Carl C. Lang filed.
08/06/87	Trustee's notice to creditors that he received offer from Board of Directors of IEC to purchase debtor's stock for $25,000.00 and trustee will consummate sale unless objections are filed within 20 days.
08/06/87	Notice of above mailed. (44)
08/26/87	Objection to sale of Debtor's stockholdings in Independence Electric Corporation filed by Dickstein, Shapiro & Morin, Arthur J. Galligan, Attorney.
08/26/87	Withdrawal of attorney for debtor filed by Gerald Kimmel.
08/27/87	ORDERED that employment of Peper, Martin, Jensen, Maichel & Hetlage as counsel for debtor is approved and shall be substituted as counsel for debtor.
08/31/87	Objection to sale of debtor's stockholdings in Independence Electric Corp. set for hearing 9-30-87 at 9:30 am, any opposing responses must be filed by 9-21-87, FURTHER ORDERED that counsel for debtor has until 9-21-87 to file a pleading indicating position of debtor with respect to said sale filed.
08/25/87*	Application to substitute counsel filed by debtor.
08/26/87*	Motion to extend the time period for filing objections to proposed sale of assets filed by debtor.
08/31/87	ORDERED that counsel for debtor shall have until 9-21-87 to file a pleading indicating position of debtor with respect to said sale.

Date of Filing	Proceedings
09/21/87	Objections of debtor to proposed sale of debtor's common stock in Independence Electric Corp. filed.
	Petition to Convert to Chapter 11 filed by debtor.
10/02/87	ORDERED that debtor's petition to convert to Chapter 11 is GRANTED, and that this order constitute an order for relief under Chapter 11, debtor to file by 10-16-87 his Chapter 11 Statement of Affairs and schedules and 20 largest Unsecured Creditors, that Stuart Radloff is discharged of his trust as Chapter 7 Trustee. Complete inventory to be filed by 10-16-87, reports and summaries be filed monthly, first report be filed by 11-15-87, each monthly report to be filed by the 15th of each succeeding month, debtor to file his disclosure statement and Plan of Reorganization by 2-2-88.
10/20/87	Debtor's Statement of Affairs, A schedules, B schedules, schedule of current income and current expenditures, Statement of Executory contracts, List of 20 Largest Unsecured claims and amended matrix filed.
11/6/87	Application for attorney's fees filed by Carl C. Lang.
	Trustee's application for fees filed.
10/29/87*	Order for meeting of creditors § 341 set for hearing on 11-18-87 at 2:00 pm under Chapter 11, that 2-16-88 is last day for filing proof of claim, that 1-19-88 is last day for filing a complaint to determine the dischargeability of a debt filed.
	Certificate of mailing on above notice. (57)

Date of Filing	Proceedings
02/01/88	Debtor's amendment to Schedule A-3 and summary filed.
	Debtor's disclosure statement and plan of reorganization filed.
02/03/88	ORDERED that hearing on adequacy of debtor's disclosure statement be held on 3-7-88 at 9:30 a.m. and counsel for debtor to transmit before 2-8-88 to each creditor notice of hearing and file certificate of mailing before 2-10-88.
	Notice of hearing on disclosure statement to be mailed filed.
02/10/88	Notice of hearing on trustee's application for payment of compensation and application of attorney for trustee for payment of compensation set 3-7-88 at 9:30 a.m. mailed to creditors. Objections must be filed by 3-4-88.
	Certificate of mailing of copies of notice of hearing on disclosure statement and notice of hearing on trustee application and attorney for trustee application for compensation to creditors filed.
03/08/88	ORDERED that debtor show cause on 3-30-88 why this case should not be dismissed for debtor's failure to qualify as a Chapter 11 debtor.
03/08/88	Notice of above mailed. (68)
03/22/88	Debtor's motion to extend to exclusive period filed.
	ORDERED that show cause order is vacated and matter to be had on 3-28-88 at 9:30 a.m.
03/22/88	Notice of above mailed. (66)
03/23/88	Debtor's motion to extend exclusive period set for hearing 3-28-88 at 9:30 a.m.

Date of Filing	Proceedings
08/01/88	Memorandum opinion filed.
08/01/88	ORDERED that debtor granted 10 days to reconvert this case to Chapter 7 case and if no conversion received, this case shall be dismissed.
07/29/88	Certification of noticing fees and bills for collection filed; total for copies $12.50 and paid 8-5-88.
08/10/88	Debtor's request for extension of time until 8-20-88 to elect to convert or dismiss case filed and SO ORDERED by Judge.
	Debtor's request for extension of time, until 8-31-88, to file notice of appeal filed and SO ORDERED by Judge.
08/19/88	Amended certificate of noticing fees and bill for collection filed; total owed $50.00. Paid.
03/31/88*	Notice of appearance filed by Leslie Davis.
08/30/88	Debtor's notice of appeal of order of 8-1-88 filed.
09/04/88	Designation of record on appeal filed.
10/07/88	Supplement to debtor's/appellant's designation of record on appeal filed.
10/14/88	Transcript on appeal of hearing on 3-28-88 filed.
	Transcript on appeal of hearing on 3-7-88 filed.
10/19/88	Notice of appeal transmitted to U.S.D.C. 88-2026-C(5)
05/08/90	ORDER that debtor file by 5-18-90 his motion to reconvert this case to Chapter 7 or this case shall be dismissed without further notice.

Date of Filing	Proceedings
05/17/90	ORDER that Court's order of 5-11-90 is set aside and Jonathan W. Belsky, to enter his appearance for debtor and debtor's counsel to advise Court within 5 days of entry of order granting or denying debtor's motion for rehearing *en banc*, currently pending in U.S. Court of Appeals and debtor to file monthly operating reports on a timely basis, all reports to be filed within 30 days of date of this order.
05/23/90	ORDER that Court's order of 5-11-90 is set aside and Jonathan W. Belsky to file entry of appearance in this Chapter 11 case and debtor's counsel to advise Court within 10 days of entry of order granting or denying debtor's motion for rehearing, en banc, currently pending in U.S. Court of Appeals and debtor to file monthly operating reports and to be filed for all months which this Chapter 11 has been pending.
05/24/90	ORDER that trustee authorized to pay Carl C. Lang, attorney for trustee, sum of $1,696.25 for services rendered.
06/21/90	FINANCIAL reports for months ended 10-87, 10-89, 11-89, 12-89, 1-90, 2-90, 3-90, 4-90 and 5-90 filed.
06/18/90	ENTRY of special appearance by Jonathan W. Belsky on behalf of debtor for purposes stated in order of 5-23-90.
07/12/90	FINANCIAL report for month 06-01-90.
08/09/90	FINANCIAL report for month of 07/90.
09/05/90	FINANCIAL report for month of 08/90.
10/10/90	FINANCIAL report for month of 09/90.
11/06/90	FINANCIAL report for month of 10/90.
12/12/90	FINANCIAL report for month of 11/90.
01/07/91	FINANCIAL report for month of 12/90.
02/08/91	FINANCIAL report for month of 01/91.

Date of Filing	Proceedings
	United States District Court
10/19/88	CAUSE TRANSFERRED FROM U.S. BANKRUPTCY COURT w/attached Designation of Record, Certified copy of Docket Sheets, 2 Transcripts dated 3/7/88 and 3/28/88 and exhibits. (EOD 10/23/88)
11/03/88	Motion for extension of time to file brief filed by Debtor/Appellant. EXTENSION OF TIME GRANTED UNTIL 12/4/88 to file brief (EOD 11/9/88)
12/05/88	ENTRY of Appearance by Jonathan Belsky on behalf of the Appellant/Debtor Sheldon B. Toibb filed. (EOD 12/29/88)
	EXTENSION OF TIME GRANTED UNTIL 1/5/89 to file brief filed by appellant/debtor Toibb filed. (EOD 12/29/88)
01/05/89	EXTENSION OF TIME GRANTED UNTIL 2/1/89 to file Appellant's trial brief filed by Appellant (EOD 1/9/88)
02/03/89	BRIEF IN BEHALF OF DEBTOR-APPELLANT Sheldon Baruch Toibb, filed. (EOD 2/8/89)
02/22/89	Bankruptcy appeal filed 10/19/88 submitted to Judge Limbaugh (EOD 2/21/89)
05/19/89	*ORDER* (SNL), filed. IT IS HEREBY ORDERED that the Order of the United States Bankruptcy Court for the Eastern District of Missouri dismissing Debtor Reorganization Case under Chapter 11 of the Bankruptcy Code is AFFIRMED. MEMORANDUM filed this date. (EOD 5/19/89)
06/19/89	NOTICE of Appeal [of 5/19/89 order], filed by debtor. (FEE PAID) (Ref: 89- EM) EOD 06/19/89)

Date of Filing	Proceedings
06/19/89	Notice of Appeal, Notice of Appeal Supplement, docket sheets and entire file delivered to Appeals Clerk for processing.
07/06/89	DELIVERED TO U.S.C.A.—2 certified copies of Notice of Appeal, 2 certified copies of Clerk's Docket Entries, Notice of Appeal Supplement, Docket Fee notification form, and 2 copies of ORDER/MEMORANDUM (SNL) filed 5/19/89. cc: Notice of Appeal to Judge Limbaugh. CC: Notice of Appeal, Clerk's Docket Entries and U.S.C.A. letter of 10/19/84, to attorneys of record. (EOD 7/7/89)
07/12/89	Receipt of notice of appeal and appeal briefing schedule filed by U.S.C.A. (EOD 7/13/89)
01/12/90	Exhibit receipt filed exhibits received by counsel for plaintiff (EOD 1/12/90)
05/02/90	OPINION (U.S.C.A.) filed affirmed. (EOD 5/4/90)
05/11/90	ORDER (U.S.C.A.) filed petition for rehearing and is DENIED. Rehearing by the panel is also DENIED. (EOD 6/12/90)
06/15/90	JUDGMENT (U.S.C.A.) It is ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this court. (EOD 6/18/90)
07/02/90	ORDER (U.S.C.A.) filed. Appellant's motion to stay or recall the mandate pending the filing of a petition for writ of certiorari with the U.S. Supreme Court has been considered by the court and is DENIED. (EOD 7/5/90)
09/07/90	Notice of Filing Petition for Certiorari filed by U.S.C.A. (EOD 9/6/90)

Date of Filing	Proceedings
United States Court of Appeals	
07/11/89	DOCKETED APPEAL
07/11/89	Certified copies notice of appeal, docket entries and judgment of 5/19/89 from District Court. (1)
07/11/89	BRIEFING SCHEDULE: Method of Appendix 7/21/89; DR Appellant 7/21/89; DR Appellee 7/31/89; Trans na; Appendix & Brief Appellant 8/31/89; Brief Appellee 10/2/89; Reply Brief 10/16/89.
07/11/89	TO SETTLEMENT CONFERENCE.
07/14/89	APPEARANCE for appellant. (2)
09/01/89	MOTION by appellant for extension of time to file brief—MOTION GRANTED IN PART to 9/21/89 on 9/1/89. (3)
09/20/89	MOTION by appellant for extension of time to file brief—MOTION GRANTED to 9/26/89 on 9/20/89. (4)
09/26/89	BRIEF OF APPELLANT w/Addendum: w/ser 9/26 7 copies (20pp) (5)
11/20/89	DOCKET NOTE: Appellee notified that brief shall be due by 12/5/89 or order will be entered enjoining him from filing a brief or participating in oral argument.
11/24/89	DOCKET NOTE: No Appellee Brief will be filed.
11/28/89	TO SCREENING.
11/29/89	RETURNED FROM SCREENING—10 min.
03/12/90	**SET FOR ARGUMENT** APRIL IN ST. LOUIS.

Date of Filing	Proceedings
04/12/90	SUBMITTED ON THE BRIEFS WITHOUT ORAL ARGUMENT TO JUDGES ARNOLD, ROSS AND FAGG.
05/02/90	OPINION PER CURIAM PUBLISHED. (6)
05/02/90	JUDGMENT: The judgment of the district court is affirmed in accordance with the opinion. See 8th Cir. R. 47B. (7)
05/16/90	PETITION FOR REHEARING with suggestion for rehearing en banc filed by appellant. (8)
06/08/90	ORDER: Appellant's suggestion for rehearing en banc has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc. Petition for rehearing by the panel is also denied. (9)
06/15/90	MANDATE ISSUED.
06/18/90	RECEIPT FOR MANDATE. (10)
06/21/90	MOTION to Stay or Recall mandate Pending Application to the Supreme Court for Writ of Certiorari filed by appellant. (11)
06/29/90	ORDER: Appellant's motion to stay or recall the mandate pending the filing of a writ of certiorari with the Supreme Court is denied. (12)
09/05/90	NOTICE OF FILING of petition for writ of certiorari with the U.S. Supreme Court as Case No. 90-368 on 8-2-90. (13)
01/28/91	CERTIFIED COPY OF Supreme Court order granting certiorari in 90-368. (14)

Date of Filing	Proceedings
United States Supremc Court	
08/02/90	Petition for Writ of Certiorari to the United States Court of Appeals, Eighth Circuit, filed by Sheldon Baruch Toibb *Pro Se*.
01/18/91	Order Granting Petiiton for Writ of Certiorari.

Debtor selects the following property as exempt pursuant to
11 U.S.C. § 522(d) [or the laws of the State of Missouri]

Schedule B-4.—Property claimed as exempt

Type of property	Location, description, and, so far as relevant to the claim of exemption, present use of property	Specify statute creating the exemption	Value claimed exempt
Household goods and wearing apparel	Debtor's possession	513.430(1) RSMo.	$1,000.00
Equity, if any, in 1980 Toyota Celica GT	Debtor's possession	513.430(5) RSMo.	500.00
Debtor's interest in bank accounts, cash on hand, pre-bankruptcy earnings, excess equity in automobile, and any other assets in which Debtor claims an interest	Debtor's possession	513.430(3) RSMo.	400.00
		Total	1,900.00

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Case No. 86-02881(3)

IN RE: SHELDON B. TOIBB,
Debtor.

NOTICE TO CREDITORS

TO: ALL CREDITORS AND OTHER PARTIES IN INTEREST.

PLEASE BE ADVISED that among the assets scheduled by Sheldon Toibb in his bankruptcy schedules was 400 shares of stock held by Mr. Toibb in Independence Electric Corporation ("IEC"). IEC is a privately held corporation in which Mr. Toibb held a minority interest, organized to explore various ventures in energy development and related fields. The Trustee has now received an offer from the Board of Directors of IEC to purchase Mr. Toibb's minority stock interest in the corporation for the sum of $25,000.00. Given the fact that IEC has not shown a profit in the last five years, and given the fact that there is no ready market for said stock, the Trustee believes that the offer submitted by IEC is fair and reasonable.

ACCORDINGLY, TAKE NOTICE that the Trustee will proceed to consummate said sale to IEC for the sum of $25,000.00, unless meritorious objection be filed in writing within 20 days of the date of this Notice, with the Clerk of the Bankruptcy Court, 1114 Market Street, St. Louis, MO 63101, with a copy to the undersigned.

Dated at St. Louis, Missouri on this 6th day of August, 1987.

/s/ Carl C. Lang
CARL C. LANG
Attorney for Trustee
7777 Bonhomme, 14th Floor
Clayton, Missouri 63105

/s/ Stuart J. Radloff
STUART J. RADLOFF
Trustee

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Case No. 86-02881-(3)

IN RE: SHELDON B. TOIBB,
Debtor.

PETITION TO CONVERT TO CHAPTER 11

Sheldon B. Toibb, by his undersigned counsel, hereby petitions, pursuant to Section 706 of the Bankruptcy Code, 11 U.S.C. § 706(a), to convert this case to a case under Chapter 11 of the Bankruptcy Code. In support of this petition, the Debtor states the following:

1. On November 18, 1986, the Debtor filed a petition for relief under Chapter 7 of the Bankruptcy Code.

2. This case has not been converted under Section 1112, 1307 or 1208 of the Bankruptcy Code.

3. The Debtor is eligible to be a debtor under Chapter 11 of the Code and desires to convert this case to a case under Chapter 11.

WHEREFORE, the Debtor prays that an order of relief be entered under Chapter 11 of Title 11 of the United States Code.

PEPER, MARTIN, JENSEN, MAICHEL
AND HETLAGE

By: /s/ Audrey G. Fleissig
AUDREY G. FLEISSIG
720 Olive Street, 24th Floor
St. Louis, Missouri 63101
Telephone: (314) 421-3850

Attorneys for Debtor

STATE OF MISSOURI)
) ss.
COUNTY OF ST. LOUIS)

Sheldon B. Toibb, being first duly sworn, do state that I have read the foregoing Petition to Convert to Chapter 11, and that the statements contained therein are true and correct to the best of my knowledge and belief.

/s/ Sheldon B. Toibb
SHELDON B. TOIBB

SUBSCRIBED AND SWORN TO BEFORE ME this 18th day of September, 1987.

/s/ Sue Welsh
Notary Public

My Commission Expires:
Sue Welsh
Notary Public, State of Missouri
[Illegible]

[Certificate of Service Omitted in Printing]

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Cause No. 86-02881(3)

IN RE: SHELDON BARUCH TOIBB,
Debtor.

OBJECTIONS OF DEBTOR TO PROPOSED SALE OF DEBTOR'S COMMON STOCK IN INDEPENDENCE ELECTRIC CORPORATION

Sheldon B. Toibb, debtor herein, hereby objects to the proposed sale of debtor's 400 shares of common stock in Independence Electric Corporation ("IEC"), on the grounds that the debtor has petitioned to convert this case to a case under Chapter 11, and is therefore entitled to deal with the stock pursuant to a plan of reorganization. Moreover debtor states that the sale proposed by the trustee should not be approved, in any event, because any sale of the Debtor's interest in IEC to IEC or its directors would be unjust and inequitable, and because both the offer received and the sale proposed violate the applicable Delaware law.

In support of his objections, the Debtors states the following:

1. The Debtor filed a petition for relief under Chapter 7 of the Bankruptcy Code on November 18, 1986.

2. The petition was filed, in part, because the Debtor had been informed by the two other shareholders of IEC, who together hold the majority of the shares and are the only remaining directors of IEC, that they had decided to abandon the operations of the corporation.

3. Based upon the representations of the other shareholders/directors of IEC, the Debtor believed that his 400 shares of IEC had absolutely no value.

4. Months after the bankruptcy petition was filed, the Debtor discovered that contrary to their assertions, the directors and officers of IEC did not abandon the operations of the corporation. Indeed, the Debtor recently learned that on August 5, 1987, one day prior to the date the Trustee sent Notice to all creditors of the proposed sale of the stock to the Board of Directors of IEC, IEC was granted a license application that was pending well prior to the date the Debtor filed his petition in bankruptcy.

5. Although the value of IEC as an ongoing concern remains highly speculative, Debtor now believes that IEC may have some value.

6. On September 21, 1987, the Debtor filed a petition to convert this action to an action under Chapter 11 of the Bankruptcy Code. Inasmuch as this case has not previously been converted under Section 1112, 1307 or 1208 of the Bankruptcy Code, the debtor's right to convert the case at this time is absolute.

7. The Debtor now believes that this is an appropriate case for reorganization under Chapter 11, and under Chapter 11, the Debtor is entitled to deal with the assets of the Debtor pursuant to a plan of reorganization, including the 400 shares of stock in IEC.

8. For this reason alone, the Trustee's motion to sell the assets should at this time be denied as moot.

9. In the alternative, any sale to IEC or its directors should be denied, in any event, for three additional reasons. First, such a sale would not be fair and equitable. The debtor is a minority shareholder in IEC, holding 24% of the stock of the corporation. The proposed purchase by IEC or its shareholders is nothing more than a continuation of an unfair, improper and illegal scheme by the majority shareholders to exclude the debtor from the corporation.

10. A sale of the debtor's stock to the two remaining shareholders or to the corporation would have the effect of sanctioning and consummating the illegal scheme. For this reason, IEC and its shareholders should be disqualified as purchasers of the debtor's stock in IEC.

11. Second, the proposed offer was not validly made. The corporate charter of IEC requires that there be three members of the Board of Directors, and that any vacancy be filled by the shareholders at a meeting duly called for that purpose. The debtor was removed from the Board of Directors in late 1986. Since that time, there has not been a meeting of shareholders for the purpose of filling the vacancy on the Board. Consequently, there exists no validly constituted Board of Directors authorized to make the offer and purchase of stock presently proposed.

12. Finally, on information and belief, IEC's debts currently exceed its assets. Consequently, any redemption by IEC of its own shares while undercapitalized would violate Chapter 160 of the Delaware Code and is therefore prohibited and would constitute a fraud against IEC's own creditors.

Accordingly, the Debtor respectfully requests that the proposed sale of Debtor's stock in IEC be denied based upon Debtor's conversion of this case to a case under Chapter 11, in order to permit the Debtor a fair opportunity to reorganize his affairs. In the alternative, the debtor requests that any proposed sale be denied on the ground that the offer was not validly made and the sale would violate Delaware law, and that the Court further disqualify IEC and its remaining shareholders, officers

and directors from any purchase, on the ground that any sale to such parties would be unjust and inequitable.

PEPER, MARTIN, JENSEN, MAICHEL AND HETLAGE

By /s/ Audrey G. Fleissig
LEWIS R. MILLS
AUDREY G. FLEISSIG
720 Olive Street, 24th Floor
St. Louis, MO 63101
(314) 421-3850

Copies of the foregoing mailed this 21st day of September, 1987, to:

Stuart J. Radloff
Trustee
7777 Bonhomme Ave., 14th Floor
St. Louis, MO 63105

Carl L. Lang
Attorney for the Trustee
7777 Bonhomme Ave., 14th Floor
St. Louis, MO 63105

Arthur J. Galligan
Attorney for Objector
2101 L. Street, N.W.
Washington, D.C. 20037

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Case No. 86-02881-BSS

IN RE SHELDON B. TOIBB,
Debtor

ORDER

At St. Louis, in this District, this 2nd day of 0ctober, 1987.

The Objection To Sale Of Debtor's Stockholdings In Independence Electric Corporation, filed August 26, 1987, by Arthur J. Galligan, came on for hearing on September 30, 1987. Debtor's counsel appeared prior to the call of the docket and filed Debtor's Petition To Convert To Chapter 11, and announced no opposition to the Petition To Convert from the Trustee, Stuart J. Radloff, or the Objector, Arthur J. Galligan. Upon said announcement and review of the record in this case, it is

ORDERED that Debtor's Petition To Convert To Chapter 11 be and it hereby is GRANTED, and that this Order constitute an order for relief under Chapter 11, Debtor being directed by this Order to file, on or before October 16, 1987, his Chapter 11 Statement of Affairs and Schedules and his Schedule of Twenty (20) Largest Unsecured Creditors; and

That Stuart J. Radloff be and he hereby is discharged of his trust as Chapter 7 Trustee in this case and the surety on his blanket bond is released from any further liability thereunder in this case.

IT IS FURTHER ORDERED that

(1) Debtor comply with the provisions of Bankruptcy Rule 2015 (effective August 1, 1983);

(2) The complete inventory required to be filed by Rule 2015(a)(1), be filed on or before October 16, 1987, and state, as to the items of property so described in said inventory, the value thereof, whether encumbered, and, if so, to identify the entity (by name and address including the zip code) holding the encumbrance, and stating the amount of the secured debt secured by each such encumbrance described;

(3) The reports and summaries required by 11 U.S.C. 704(7) [designated as 11 U.S.C. 704(8) by the Bankruptcy Amendments and Judgeship Act of 1984] and by Bankruptcy Rule 2015(a)(3), be filed monthly, the first of such reports to be filed on or before November 15, 1987, to embrace the period between October 2, 1987, and October 31, 1987; and each successive monthly report thereafter to be filed on or before the 15th day of each succeeding month, to embrace the period of the calendar month immediately preceding the due date of such report;

(4) The reports required to be filed by this Order, and by said 11 U.S.C. 704(7) [or (8), as the case may be,] and by Bankruptcy Rule 2015(a), include not only statements of receipts and disbursements (as by Section 704 is required), and not only statements complying with Bankruptcy Rule 2015(a)(3), but also include a profit and loss statement, and a statement describing each debt incurred during the reporting period and remaining unpaid at the end of said reporting period;

(5) Each such report be filed, in duplicate, and that a copy of each such report be mailed (on the date of filing) to each member of the Official Creditors Committee and to Chief, Special Procedures Section, Internal Revenue Service, P. O. Box 1457, H. W. Wheeler Station, St. Louis, MO, 63188;

(6) Debtor file his Disclosure Statement and Plan of Reorganization on or before February 2, 1988, unless such time is extended by Order of this Court; failure to file such Statement and Plan within such time may be grounds for conversion or dismissal; and

(7) Debtor submit to this Court, for review and approval, all notices to credtiors and parties in interest prior to mailing.

Barry S. Schermer
BARRY S. SCHERMER
United States Bankruptcy Judge

Copy mailed to:

Sheldon Baruch Toibb
Debtor
8640 Olive Blvd.—Apt. A
St. Louis, MO 63132

Audrey G. Fleissig
Attorney for Debtor
720 Olive—24th Floor
St. Louis, MO 63101

Stuart J. Radloff
Chapter 7 Trustee
7777 Bonhomme—14th Floor
Clayton, MO 63105

Chief, Special Procedures Section
Internal Revenue Service
P. O. 1457—H. W. Wheeler Station
St. Louis, MO 63188

Arthur J. Galligan
Objector
2101 L Street N. W.
Washington, DC 20037

STATEMENT OF FINANCIAL AFFAIRS FOR
DEBTOR ENGAGED IN BUSINESS

UNITED STATES BANKRUPTCY COURT FOR THE
EASTERN DISTRICT OF MISSOURI

Case No. 86-02881 (3)

IN RE SHELDON BARUCH TOIBB

Debtor [set forth here all names including trade names used by Debtor within last 6 years]

Social Security Number 494-50-3162 and Debtor's Employer's Tax Identification No.

Statement of Financial Affairs for Debtor Engaged in Business

[Each question shall be answered or the failure to answer explained. If the answer is "none" or "not applicable," so state. If additional space is needed for the answer to any question, a separate sheet properly identified and made a part hereof, should be used and attached.

If the debtor is a partnership or a corporation, the questions shall be deemed to be addressed to, and shall be answered on behalf of, the partnership or corporation; and the statement shall be certified by a member of the partnership or by a duly authorized officer of the corporation.

The term, "original petition," used in the following questions, shall mean the petition filed under Rule 1002, 1003, or 1004.]

---

1. *Nature, location, and name of business*

a. Under what name and where do you carry on your business?

Sheldon B. Toibb

b. In what business are you engaged? (If business operations have been terminated, give the date of termination.)

Energy Consultant; Private Fundraiser

c. When did you commence the business?

Consultant, 1983

d. Where else, and under what other names, have you carried on business within the six years immediately preceding the filing of the original petition herein? (Give street addresses, the names of any partners, joint adventurers, or other associates, the nature of the business, and the periods for which it was carried on.)

Independence Electric Corporation,
1983-1986 Washington, D.C.
Alternative Energy Project Developer

2. *Books and records.*

a. By whom, or under whose supervision, have your books of account and records been kept during the six years immediately preceding the filing of the original petition herein? (Give names, addresses, and periods of time.)

Debtor's

b. By whom have your books of account and records been audited during the six years immediately preceding the filing of the original petition herein? (Give names, addresses, and dates of audits.)

N/A

c. In whose possession are your books of account and records? (Give names and addresses.)

Debtor's possession

d. If any of these books or records are not available, explain.

N/A

e. Have any books of account or records relating to your affairs been destroyed, lost, or otherwise disposed of within the two years immediately preceding the filing of the original petition herein? (If so, give particulars, including date of destruction, loss, or disposition, and reason therefor.)

No

3. *Financial statements.*

Have you issued any written financial statement within the two years immediately preceding the filing of the original petition herein? (Give dates, and the name and addresses of the persons to whom issued, including mercantile and trade agencies.)

No

4. *Inventories.*

a. When was the last inventory of your property taken?

b. By whom, or under whose supervision, was this inventory taken?

c. What was the amount, in dollars, of the inventory? (State whether the inventory was taken as cost, market, or otherwise.)

d. When was the next prior inventory of your property taken?

e. By whom, or under whose supervision, was this inventory taken?

f. What was the amount, in dollars, of the inventory? (State whether the inventory was taken at cost, market, or otherwise.)

g. In whose possession are the records of the two inventories above referred to? (Give names and addresses.)

N/A

5. *Income other than from operation of business.*

What amount of income, other than from operation of your business, have you received during each of the two years immediately preceding the filing of the original petition herein? (Give particulars, including each source, and the amount received therefrom.)

1986—$500.00: Eastern Missouri Psychiatric Association; 1987—$100.00: Levin Brothers Poultry Company

6. *Tax returns and refunds.*

a. In whose possession are copies of your federal, state and municipal income tax returns for the three years immediately preceding the filing of the original petition herein?

Debtor's Possession

b. What tax refunds (income or other) have you received during the two years immediately preceding the filing of the original petition herein?

District of Columbia $527.00
State of Maryland $574.00
District of Columbia, $286.00

c. To what tax refunds (income or other), if any, are you, or may you be, entitled? (Give particulars, including information as to any refund payable jointly to you and your spouse or any other person.)

None

7. *Financial accounts, certificates of deposit and safe deposit boxes.*

a. What accounts or certificates of deposit or shares in banks, savings and loan, thrift, building and loan and homestead associations, credit unions, brokerage houses, pension funds and the like have you maintained, alone or together with any other person, and in your own or any other name, within the two years immediately preceding the filing of the original petition herein? (Give the name and address of each institution, the name and number under which the account of certificate is maintained, and the name and address of every person authorized to make withdrawals from such account.)

First American Bank of Washington
3700 Calvert Street, N.W.,
Washington, D.C. 20057
Checking Account No. 5-249-769

b. What safe deposit box or boxes or other depository or depositories have you kept or used for your securities, cash, or other valuables within the two years immediately preceding the filing of the original petitin herein? (Give the name and address of the bank or other depository, the name in which each box or other depository was kept, the name and address of every person who had the right of access thereto, a description of the contents thereof, and, if the box has been surrendered, state when surrendered or, if transferred, when transferred, and the name and address of the transferee.)

None

8. *Property held for another person.*

What property do you hold for any other person? (Give name and address of each person, and describe the property, the amount or value thereof and all writing relating thereto.)

None

9. *Property held by another person.*

Is any other person holding anything of value in which you have an interest? (Give name and address, location and description of the property, and circumstances of the holding.)

Yes. Stieferman Brothers Van & Storage
10899 Indian Head Industrial Blvd.
St. Louis, MO 63132
Books and Furniture

10. *Prior bankruptcy proceedings.*

What cases under the bankruptcy Act or title 11, United States Code have previously been brought by or against you? (State the location of the bankruptcy court, the nature and number of the case, and whether a discharge was granted or denied, the case was dismissed, or a composition, arrangement, or plan was confirmed.)

None; this case converted from Chapter 7.

1. *Receiverships, general assignments, and other modes of liquidation.*

a. Was any of your property, at the time of the filing of the original petition herein, in the hands of a receiver, trustee, or other liquidating agent? (If so, give a brief description of the property and the name and address of the receiver, trustee, or other agent, if the agent was appointed in a court proceeding, the name and location of the court, the title and number of the case, and the nature thereof.)

No

b. Have you made any assignment of your property for the benefit of your creditors, or any general settlement with your creditors, within the two years immediately preceding the filing of the original peti-

tion herein? (If so, give dates, the name and address of the assignee, and a brief statement of the terms of assignment or settlement.)

No.

2. *Suits, executions, and attachments.*

a. Were you a party to any suit pending at the time of the filing of the original petition herein? (If so, give the name and location of the court and the title and nature of the proceeding.)

a) Yes.

1. Superior Court of the District of Columbia; First Virginia Bank, Plaintiff; Case #CA04699-86 amounts claimed on Visa card —$6,379.04.

2. Sovran Bank, N.A. v. Sheldon Toibb; Norfolk General District Court, Norfolk, Va., Cause No. V8658998; amounts claimed on Visa and Mastercard—$5,521.13.

b. Were you a party to any suit terminated within the year immediately preceding the filing of the original petition herein? (If so, give the name and location of the court, the title and nature of the proceeding, and the result.)

b) No.

c. Has any of your property been attached, garnished, or seized under any legal or equitable process within the year immediately preceding the filing of the original petition herein? (If so, describe the property seized or person garnished, and at whose suit.)

c) No.

3. a. *Payments of loans, installment purchases and other debts.*

What payments in whole or in part have you made during the year immediately preceding the filing of the original petition herein on any of the following: (1) loans; (2) installment purchases of goods and services; and (3) other debts? (Give the names and addresses of the persons receiving payment, the amounts of the loans or other debts and of the purchase price of the goods and services, the dates of the original transactions, the amounts and dates of payments, and, if any of the payees are your relatives or insiders, the relationship; if the debtor is a partnership and any of the payees is or was a partner or a relative of a partner, state the relationship; if the debtor is a corporation and any of the payees is or was an officer, director, or stockholder, or a relative of an officer, director, or stockholder, state the relationship.)

No payments by Debtor on loans, installment purchases or debts.

No payments to insiders.

b. *Setoffs.*

What debts have you owed to any creditor, including any bank, which were setoff by that creditor against a debt or deposit owing by the creditor to you during the year immediately preceding the filing of the original petition herein? (Give the names and addresses of the persons setting off such debts, the dates of the setoffs, the amounts of the debts owing by you and to you and, if any of the creditors are your relatives or insiders, the relationship.)

IRS has set off Debtor's income tax refund against taxes owed.

4. *Transfers of property.*

a. Have you made any gifts, other than ordinary and usual presents to family members and charitable donations during the year immediately preceding the filing of the original petition herein? (If so, give names and addresses of donees and dates, description, and value of gifts.)

No.

b. Have you made any other transfer, absolute or for the purpose of security, or any other disposition which was not in the ordinary course of business during the year immediately preceding the filing of the original petition herein? (Give a description of the property, the date of the transfer or disposition, to whom transferred or how disposed of, and state whether the transferee is a relative, partner, shareholder, officer, director or insider, the consideration, if any, received for the property, and the disposition of such consideration.)

No.

5. *Accounts and other receivables.*

Have you assigned, either absolutely or as security, any of your accounts or other receivables during the year immediately preceding the filing of the original petition herein? (If so, give names and addresses of assignees.)

No.

6. *Repossessions and returns.*

Has any property been returned to, or repossessed by, the seller, lessor, or a secured party during the year immediately preceding the filing of the original petition herein? (If so, give particulars, including

the name and address of the party getting the property and its description and value.)

No.

7. *Business leases.*

If you are a tenant of business property, what is the name and address of your landlord, the amount of your rental, the date to which rent had been paid at the time of the filing of the original petition herein, and the amount of security held by the landlord?

N/A

8. *Losses.*

a. Have you suffered any losses from fire, theft, or gambling during the year immediately preceding the filing of the original petition herein? (If so, give particulars, including dates, names, and places and the amounts of money or value and general description of property lost.)

No

b. Was the loss covered in whole or part by insurance? (If so, give particulars.)

N/A

9. *Withdrawals.*

a. If you are an individual proprietor of your business, what personal withdrawals of any kind have you made from the business during the year immediately preceding the filing of the original petition herein?

None

b. If the debtor is a partnership or corporation, what withdrawals, in any form (including compen-

sation, bonuses or loans), have been made or received by any member of the partnership, or by any officer, director, managing executive, or shareholder of the corporation, during the year immediately preceding the filing of the original petition herein? (Give the name and designation or relationship to the debtor of each person, the dates and amounts of withdrawals, and the nature or purpose thereof.)

10. *Payments or transfers to attorneys.*

a. Have you consulted an attorney during the year immediately preceding or since the filing of the original petition herein? (Give date, name, and address.)

a) Yes.

1) A. Thomas DeWoskin, 7711 Carondelet Avenue, 10th Floor, St. Louis, MO 63105; during course of Chapter 7 proceeding

2) Audrey G. Fleissig, 720 Olive Street 24th Floor, St. Louis, MO 63101

b. Have you during the year immediately preceding or since the filing of the orginal petition herein paid any money or transferred any property to the attorney, or to any other person on his behalf? (If so, give particulars, including amount paid or value of property transferred and date of payment or transfer.)

b) Yes.

1) Peper, Martin, Jensen, Maichel and Hetlage—$4,000 retainer.

c. Have you, either during the year immediately preceding or since the filing of the original petition herein, agreed to pay any money or transfer any property to an attorney at law, or to any other

person on his behalf? (If so, give particulars, including amount and terms of obligation.)

c) No, except as above.

(If the debtor is a partnership or corporation, the following additional questions should be answered.)

11. *Members of partnership; officers, directors, managers, and principal stockholders of corporation.*

a. What is the name and address of each member of the partnership, or the name, title, and address of each officer, director, insider, and managing executive, and of each stockholder holding 20 percent or more of the issued and outstanding stock, of the corporation?

b. During the year immediately preceding the filing of the original petition herein, has any member withdrawn from the partnership, or any officer, director, insider, or managing executive of the corporation terminated his relationship, or any stockholder holding 20 percent or more of the issued stock disposed of more than 50 percent of his holdings? (If so, give name and address and reason for withdrawal, termination, or disposition, if known.)

c. Has any person acquired or disposed of 20 percent or more of the stock of the corporation during the year immediately preceding the filing of the petition? (If so, give name and address and particulars.)

I, _____, declare under penalty of perjury that I have read the answers contained in the foregoing statement of affairs and that they are true and correct to the best of my knowledge, information, and belief. Executed on _____

Signature: _____

ADVISORY COMMITTEE NOTE

Many of the questions on this form are the same as on Form No. 7. Statement of Financial Affairs for Debtor Not Engaged in Business.

The question regarding loans repaid (#13) includes installment credit sales of goods or services. The information is helpful with respect to possible preferences.

Information regarding leases (#17) may be helpful with respect to lease termination or extension and whether the landlord may be holding a deposit.

AMENDED
SCHEDULES OF ASSETS AND LIABILITIES
UNITED STATES BANKRUPTCY COURT FOR THE
EASTERN DISTRICT OF MISSOURI

Case No. 86-02881(3)

IN RE: SHELDON BARUCH TOIBB

Debtor [set forth here all names including trade names used by Debtor within last 6 years].

Social Security Number 494-50-3162

and Debtor's Employer's Tax Identification No. ———

Schedule A—Statement of All Liabilities of Debtor.

Schedules A-1, A-2, and A-3 must include all the claims against the debtor or his property as of the date of the filing of the petition by or against him.

Schedule A-1.—Creditors having priority.

Nature of claim.	Name of creditor and complete mailing address including zip code.	Specify when claim was incurred and the consideration therefor; when claim is subject to setoff, evidenced by a judgment, negotiable instrument, or other writing, or incurred as partner or joint contractor, so indicate; specify name of any partner or joint contractor on any debt.	Indicate if claim is contingent, unliquidated, or disputed.	Amount of claim.
a. Wages, salary, and commissions, including vacation, severance and sick leave pay owing to employees not exceeding $2,000 to each, earned within 90 days before filing of petition or cessation of business (if earlier specify date).	NONE			$ -0-
b. Contributions to employee benefit plans for services rendered within 180 days before filing of petition or cessation of business (if earlier specify date).	NONE			-0-
c. Deposits by individuals, not exceeding $900 for each for purchase, lease, or rental of property or services for personal, family, or household use that were not delivered or provided.	NONE			-0-
d. Taxes owing [itemize by type of tax and taxing authority].				
(1) To the United States	1) Internal Revenue Service Philadelphia, PA	Interest & penalty claimed on taxed owed; incurred March 1985;	Disputed	4,200.63
(2) To any state	2) NONE			-0-
(3) To any other taxing authority	3) NONE			-0-
			Total	4,200.63

AMENDED

Schedule A-2—Creditors Holding Security.

Name of creditor and complete mailing address including zip code.	Description of security and and date when obtained by creditor.	Specify when claim was incurred and the consideration therefor; when claim is subject to setoff, evidenced by a judgment, negotiable instrument, or other writing, or incurred as partner or joint contractor, so indicate; specify name of any partner or joint contractor on any debt.	Indicate if claim is contingent, unliquidated, or disputed.	Market value.	Amount of claim without deduction of value of security.
	IRS may claim tax lien, see Schedule A-1 (d)			$	$ unknown
				Total	unknown

40

AMENDED

Schedule A-3—Creditors having unsecured claims without priority.

Name of creditor (including last known holder of any negotiable instrument) and complete mailing address including zip code.	Specify when claim was incurred and the consideration therefor; when claim is contingent, unliquidated, disputed, subject to setoff, evidenced by a judgment, negotiable instrument, or other writing, or incurred as partner or joint contractor, so indicate; specify name of any partner or joint contractor on any debt.	Indicate if claim is contingent, unliquidated, or disputed.	Amount of claim.
American Express Travel Related Services Co., Inc. 777 American Expressway Fort Lauderdale FL 33337 Acct. #3728-308263-91005 and Capitol Credit Corp. 1320 Fenwick Lane, #207 Silver Springs MD 20910	Charge card incurred February 1986 Collection of above credit card charges held with American Express		$ 6,465.02
Amoco Oil Company Acct. #457-204-222-6 and Diner's Club International Acct. #3045-720422-2679 P. O. Box 9014 Des Moines IA 50306 and	Charge cards incurred 1983		1,211.26

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AMENDED

Schedule A-3—Creditors having unsecured claims without priority.

Name of creditor (including last known holder of any negotiable instrument) and complete mailing address including zip code.	Specify when claim was incurred and the consideration therefor; when claim is contingent, unliquidated, disputed, subject to setoff, evidenced by a judgment, negotiable instrument, or other writing, or incurred as partner or joint contractor, so indicate; specify name of any partner or joint contractor on any debt.	Indicate if claim is contingent, unliquidated, or disputed.	Amount of claim.
Capitol Credit Corp. 1320 Fenwick Lane, #207 Silver Springs MD 20910 and Great Lakes Collection Bureau, Inc. 625 Delaware Ave. Buffalo NY 14202	Collection of above credit card charges		
Bank of America Bank Card Center P. O. Box 94116 Pasadena CA 91109 Acct. #4024-0238-1007-1643 and American Creditor's Bureau of Maryland, Inc. 1738 Elton Rd., Suites 133-135 Silver Springs MD 20903	Collection of above credit card charges Visa charge card incurred 1983 Collection of above credit charges held with Bank of America		8,082.01

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Banc One Department 0553 Columbus OH 43271 Acct. #4387-947-620-909	Visa charge card incurred 1983		4,004.35
Beneficial National Bank, U.S.A. P. O. Box 1750 Wilmington DE 19899-1750 Acct. #5212-0980-2010-1750 Acct. #4170-7570-0000-4201 and National Financial System 371 Merrick Rd. Rockville Centre NY 11520 and Allied Bond & Collection Agency 4800 Street Rd. Trevose PA 19047 ID #212-7599-0584-2369 Key #1366-4767-9	MasterCard charge card and Visa charge card incurred 1983 Collection of above MasterCard and Visa charges held with Beneficial Nt'l. Bank Collection of above MasterCard and Visa charges held with Beneficial Nt'l. Bank Disputed.		12,170.40 2,676.98 (note: disputed)
Boatmen's Bank Bank Card Center P. O. Box 7402 St. Louis MO 63177 Acct. #5151-4025-0027-1311 and GC Services Corp. Collection Agency Division P. O. Box 16947 Greensboro NC 27416	MasterCard charge card incurred 1983 Collection of above Mastercard charges held with Boatmen's Bank		1,175.67

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AMENDED

Schedule A-3—Creditors having unsecured claims without priority.

Name of creditor (including last known holder of any negotiable instrument) and complete mailing address including zip code.	Specify when claim was incurred and the consideration therefor; when claim is contingent, unliquidated, disputed, subject to setoff, evidenced by a judgment, negotiable instrument, or other writing, or incurred as partner or joint contractor, so indicate; specify name of any partner or joint contractor on any debt.	Indicate if claim is contingent, unliquidated, or disputed.	Amount of claim.
Boatmen's Bank Bank Card Center P. O. Box 7402 St. Louis, MO 63177 Acct. #4671-025-022-207 and GC Services Corp. Collection Agency Division P. O. Box 16947 Greensboro NC 27416	Visa charge card incurred 1983 Collection of Visa charges held with Boatmen's Bank		1,213.95
Bohemian Savings & Loan Assn. c/o Financial Card Center P. O. Box 82501 Lincoln NE 68501 Acct. #4317-0620-3202-7237 and Accent Service Co., Inc. P. O. Box 1175 Cedar Rapids IA 52401	Visa charge card incurred 1983 Collection of above Visa charges held with Bohemian Savings & Loan Assn.		3,139.92
C & P Telephone Co. A Bell Atlantic Company P. O. Box 27282 Richmond VA 23272-0001 Acct. #202-364-8575-965 and C & P Telephone Co. A Bell Atlantic Company P. O. Box 657 Baltimore MD 21265-0001 Acct. 202-364-8575-965	Telephone bill incurred 1986		1,303.42
Centerre Bank Bank Card Department P. O. Box 391-MS75-01 St. Louis MO 63166 Acct. #5151-3014-0020-1610	MasterCard charge card incurred 1983		1,219.12
Centerre Bank Bank Card Department P. O. Box 391-MS75-01 St. Louis MO 63166 Acct. #4670-100-257-183	Visa charge card incurred 1983		1,464.18
Centerre Bank P. O. Box 391 St. Louis MO 63166 Loan #00100116490676510	School loan incurred in 1972		2,045.68

AMENDED

Schedule A-3—Creditors having unsecured claims without priority.

Name of creditor (including last known holder of any negotiable instrument) and complete mailing address including zip code.	Specify when claim was incurred and the consideration therefor; when claim is contingent, unliquidated, disputed, subject to setoff, evidenced by a judgment, negotiable instrument, or other writing, or incurred as partner or joint contractor, so indicate; specify name of any partner or joint contractor on any debt.	Indicate if claim is contingent, unliquidated, or disputed.	Amount of claim.
Choice P. O. Box 351 Baltimore MD 21203-0352 Acct. #508-1010-5433-6402 Capitol Credit ID #51010543364 and Capitol Credit Corp. 1320 Fenwick Lane, #207 Silver Springs MD 20910	Charge card incurred 1983 Collection of above charges held by Choice		6,851.05
Citibank Mastercard P. O. Box 6001 Sioux Falls SD 57188-6001 Acct. #542418-0061-772247 and Citibank Mastercard P. O. Box 6500 Hagerstown MD 21741 Acct. #542418-0061-772247 and	Mastercard charge card incurred 1983		2,315.80
Citicorp East Coast Credit Main Line Division P. O. Box 490 Wayne PA 10987	Collection of above Mastercard charges held by Citibank Mastercard		
Clark Boardman Co., Ltd. 435 Hudson St. New York NY 10014-3993 Acct. #160228000	Books—incurred 1986		43.24
Commerce Bank Bank Card Center P. O. Box 27-500 Kansas City MO 64180 Acct. 5412-1632-9000-5583	Mastercard carge card incurred 1983		1,496.77
Commerce Bank Bank Card Center P. O. Box 27-500 Kansas City MO 64180 Acct. #4412-290-001-166	Visa charge card incurred 1983		1,331.84
Dickstein, Shapiro & Morin Attorneys at Law Suite 899 2101 "L" Street, N.W. Washington DC 20037	Legal fees incurred 1985		2,666.07
Exxon Company, U.S.A. P. O. Box 4298 Houston TX 77210 Acct. #330-600-874-3	Charge card incurred 1986		455.86

AMENDED

Schedule A-3—Creditors having unsecured claims without priority.

Name of creditor (including last known holder of any negotiable instrument) and complete mailing address including zip code.	Specify when claim was incurred and the consideration therefor; when claim is contingent, unliquidated, disputed, subject to setoff, evidenced by a judgment, negotiable instrument, or other writing, or incurred as partner or joint contractor, so indicate; specify name of any partner or joint contractor on any debt.	Indicate if claim is contingent, unliquidated, or disputed.	Amount of claim.
First American Bank of Virginia P. O. Box 1307 McLean VA 22101 Acct. #4318-200-286-682	Visa charge card incurred 1982		6,067.39
First American Bank of Washington 3700 Calvert Street, N.W. Washington, D.C. 20007 Acct. #5-249-769	Personal line of credit on checking account—incurred 1982		7,392.96
First National Bank of Chicago P. O. Box 4000 Uniondale NY 11553-0953 Acct. 5286-0080-2110-1008 Acct. #4250-021-101-008 and American Creditor's Bureau of Maryland, Inc. 1738 Elton Rd., Suites 133-135 Silver Springs MD 20903	incurred 1983 Mastercard charge card Visa charge card Collection of above Mastercard and Visa charges held by First National Bank of Chicago		1,143.12

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First Omni Bank Bank Card Center P. O. Box 800 Millsboro DE 19966 Acct. 5262-1361-1070-7704 Acct. 4336-0061-1070-7704	incurred 1983 Mastercard charge card Visa charge card		4,248.89
First Virginia Bank P. O. Box 807A Falls Church VA 22046-1698 Acct. #4332-0001-0679-4895	Visa charge card incurred 1983		6,379.04
The Halladay Corporation Suite 400 2121 Wisconsin Ave., N.W. Washington, D.C. 20007 Acct. for Apt. No. 1117	Bank rent—incurred 1986		2,417.73
Indiana National Bank c/o Card Services One Indiana Square Indianapolis IN 46266 Acct. 4262-111-015-733 and American Accounts, Inc. One American Square P. O. Box 1180 Anderson IN 46015	Visa charge card incurred 1983 Collection of Visa charges held by Indiana National Bank		6,210.50

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AMENDED

Schedule A-3—Creditors having unsecured claims without priority.

Name of creditor (including last known holder of any negotiable instrument) and complete mailing address including zip code.	Specify when claim was incurred and the consideration therefor; when claim is contingent, unliquidated, disputed, subject to setoff, evidenced by a judgment, negotiable instrument, or other writing, or incurred as partner or joint contractor, so indicate; specify name of any partner or joint contractor on any debt	Indicate if claim is contingent, unliquidated, or disputed.	Amount of claim.
Indiana National Bank c/o Card Services One Indiana Square Indianapolis IN 46266 Acct. #4262-111-014-363 and American Accounts, Inc. One American Square P. O. Box 1180 Anderson IN 46016	Visa charge card incurred 1983 Collection of above Visa charges held by Indiana National Bank		6,279.00
Maryland Bank, N.A. P. O. Bank 15020 Wilmington DE 1988509971 Acct. #5329-0315-2800-8970	Mastercard charge card incurred 1983		8,014.24
John J. McGrath, M.D. Suite 107 1616 18th St., N.W. Washington, D.C. 20009	Medical services, incurred 1985-1986		7,125.00

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MCI Telecommunications, Inc. 230 Schilling Plaza South Hunt Valley MD 21031 Acct. #R2448300 and North America Credit Assn. ICM Division, Suite 204 40 Charles Lindbergh Blvd. Uniondale NY 11553 and North America Credit Assn. 9911 W. Pico Blvd., #1200 Los Angeles CA 90035-9990	Long distance telephone service incurred 1985 Collection of long distance service charges due to MCI Telecommunications		1,500.24
Potomac Electric Power Company P. O. Box 2812 Washington, D.C. 20067-2812 Acct. #0100-6545-32 and Suburban Credit Corp. P. O. Box 900 Annandale VA 22003	Electric bill incurred 1986 Collection of above electric bill charges due Potomac Electric Power Co.		333.59
Royal Bank Mid-County and Mercantile Bank & Trust Co. Credit Card Center P. O. Box 108 St. Louis MO 63166 Acct. #4672-571-910-456	Visa charge card incurred 1983		6,932.75

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AMENDED

Schedule A-3—Creditors having unsecured claims without priority.

Name of creditor (including last known holder of any negotiable instrument) and complete mailing address including zip code.	Specify when claim was incurred and the consideration therefor; when claim is contingent, unliquidated, disputed, subject to setoff, evidenced by a judgment, negotiable instrument, or other writing, or incurred as partner or joint contractor, so indicate; specify name of any partner or joint contractor on any debt.	Indicate if claim is contingent, unliquidated, or disputed.	Amount of claim.
Shell Oil Company P. O. Box 33410 Louisville KY 40232 Acct. #680 642 998	Gasoline and service charges incurred from approx. 3/87-10/2/87		622.50
Sovran Bank P. O. Box 11125 Richmond VA 23230 Acct. #5314-5035-1073-2608	Mastercard charge card incurred 1983		2,752.67
Sovran Bank P. O. Box 11125 Richmond VA 23230 Acct. #4368-0031-0555-2055	Visa Charge card incurred 1983		2,768.46

Schedule B—Statement of All Property of Debtor

Schedules B-1, B-2, B-3 and B-4 must include all property of the debtor as of the date of the filing of the petition by or against him.

Schedule B-1.—Real Property

Description and location of all real property in which debtor has an interest (including equitable and future interests, interests in rates by the entirety, community property, life estates, lease-holds, and rights and powers exercisable for his own benefit).	Nature of interest (specify all deeds and written instruments relating thereto).	Market value of debtor's interest without deduction for secured claims listed in Schedule A-2 or exemptions claimed in Schedule B-4.
None		$ -0-
		Total -0-

Schedule B-2—Personal Property

Type of Property	Description and Location	Market value of debtor's interest without deduction for secured claims listed on Schedule A-2 or exemptions claimed in Schedule B-4
a.	Cash on hand	$ 20.00
b.	Deposits of money with banking institutions, savings and loan associations, brokerage houses, credit unions, public utility companies, landlords and others	-0-
c.	Household goods, supplies and furnishings two rooms of furniture	100.00
d.	Books, pictures, and other art objects; stamp, coin and other collections	-0-
e.	Wearing apparel, jewelry, firearms, sports equipment and other personal possessions	250.00
f.	Automobiles, trucks, trailers and other vehicles 1980 Toyota Celica GT	800.00
g.	Boats, motors and their accessories	-0-
h.	Livestock, poultry and other animals	-0-
i.	Farming equipment, supplies and implements	-0-
j.	Office equipment, furnishings and supplies	-0-
k.	Machinery, fixtures, equipment and supplies [other than those listed in items j and l] used in business	-0-
l.	Inventory	-0-
m.	Tangible personal property of any other description	-0-
n.	Patents, copyrights, licenses, franchises and other general intangibles [specify all documents and writings relating thereto]	-0-
o.	Government and corporate bonds and other negotiable and nonnegotiable instruments	-0-

p.	Other liquidated debts owing debtor	-0-
q.	Contingent and unliquidated claims of every nature, including counterclaims of the debtor [give estimated value of each] possible claim against business associates for breach of duty to Debtor	unknown
r.	Interests in insurance policies [name insurance company of each policy and itemize surrender or return value of each]	-0-
s.	Annuities [itemize and name each issuer]	-0-
t.	Stock and interests in incorporated and unincorporated companies [itemize separately] 400 shares of Independence Electric Corporation	unknown
u.	Interests in partnerships	-0-
v.	Equitable and future interests, life estates, and rights or powers exercisable for the benefit of the debtor (other than those listed in Schedule B-1) [specify all written instruments relating thereto]	-0-
	Total	$1,170.00

Schedule B-3.—Property not otherwise scheduled

Type of property	Description and location	Market value of debtor's interest without deduction for secured claims listed in Schedule A-2 or exemption claimed in Schedule B-4
a. Property transferred under assignment for benefit of creditors, within 120 days prior to filing of petition [specify date of assignment, name and address of assignee, amount realized therefrom by the assignee, and disposition of proceeds so far as known to debtor]	None	$ -0-
b. Property of any kind not otherwise scheduled	None	-0-
	Total	-0-

SCHEDULE OF CURRENT INCOME AND CURRENT EXPENDITURES

Name of Debtor SHELDON BARUCH TOIBB

EXPENSES

Estimate current monthly expenses of debtor (not including debts to be paid under a plan under chapter 11 or chapter 13 of the bankruptcy code) consisting of

Rent or home loan payment (include lot Rented for mobile home)			$ -0-
Utilities	Electricity	$ -0-	
	Water	$ -0-	
	Heat	$ -0-	
	Telephone	$50.00	
	Other	$ -0-	
	Total Utilities		$ 50.00
Food			$400.00
Clothing			$ -0-
Laundry & Cleaning			$ 20.00
Newspapers, Periodicals & Books	including (school books)		$ 50.00
Doctor & Medical Expenses			$ 20.00
Transportation	(not including auto payments to be paid under a plan under chapter 11 or chapter 13 of the bankruptcy code).		$200.00
Recreation, Club & Entertainment			$ 50.00
Insurance (not deducted from wages)			
	Auto	$50.00	
	Life	$ -0-	
(medical)	Other	$52.00	
	Total Insurance		$102.00
Taxes Not dedicated from wages or included in home loan payments			$ -0-
If you pay or are liable for payment of alimony or support payments state monthly amount			$ -0-
The name, age & relationship to you of persons for whose benefit payments are made			
Payments for support of additional dependents not living at your home			$ -0-
Other (explain)			$ -0-
Total estimated future monthly expenses			$892.00

INCOME

Give Estimated Current Monthly Income Consisting Of

Debtor's take home pay (per month)	$	-0-
Spouse's take home pay (per month)	$	-0-
Regular income available from operation of business or profession	$	uncertain
Do you receive any alimony or support payments? if so, state monthly amount	$	-0-
The name, age & relationship to you of persons for whose benefit payments are received.		
Pension, social security or retirement income	$	-0-
Other monthly income (parental support)		
Total Monthly income		$892.00

Total Monthly expenses $892.00

Am't of payment to the trustee (if applicable under Chapter 13 plan) $ N/A

Total of expenses and plan payment (if applicable) $892.00

Difference (if applicable under chapter 13 plan) $ N/A

DEPENDENTS

Number, age & relationship of dependants (except current spouse)
None

Compensation Paid or Promised to Attorney for Debtor

Have you paid or agreed to pay (or transfered or agreed to transfer any property) to your attorney for services in connection with your case other than agreeing to pay such compensation as may be allowed by the court to be paid by the trustee from monies paid to the trustee for your account? Yes ☐ No ☐

If the answer is yes, state the nature and the amount of compensation paid or promised and the source of the payment.

STATEMENT OF EXECUTORY CONTRACTS UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF MISSOURI

———

Case No. ———

IN RE SHELDON BARUCH TOIBB,
Debtor

Include here all names used by debtor within last 6 years. Debtor

———

The debtor has the following executory contracts:

Stieferman Brothers Van & Storage Co. 10899 Indian Head Industrial Blvd. St. Louis, MO 63132	contract for moving and current storage of furniture

Dated October 19, 1987 ———
Debtor

STATE OF MISSOURI)
ss.:
COUNTY OF ST. LOUIS)

INDIVIDUAL: I, ———, the debtor named in the captioned case, do hereby declare that I have read the foregoing statements, that the statements contained therein are true according to the best of my knowledge, information, and belief.

CORPORATION: I, ——— the ——— of the corporation named as petitioner in the above captioned case, do hereby declare that I have read the foregoing statement, that the statements contained therein are true according to the best of my knowledge, infor-

mation, and belief, and that the filing of this statement on behalf of the corporation has been authorized.

PARTNERSHIP: I, ———— *a member—an thorized agent*—of the partnership named as petitioner in the above case, do hereby declare that I have read the foregoing statement, that the statements contained therein are true, according to the best of my knowledge, information, and belief and that the filing of this statement on behalf of the partnership has been authorized.

Subscribed and sworn to before me on October 19, 1987

———

Debtor

———

———

Official Character

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

———

Case No. 86-02881(3)

IN RE: SHELDON BARUCH TOIBB, 494-50-3162,
Debtor.

———

AMENDMENT TO SCHEDULES

COMES NOW, Sheldon Baruch Toibb and hereby files an amended Schedule A-3 to reflect four additional unsecured creditors and a Summary of Debts and Property. These creditors were already included on the matrix previously filed with the Court.

PEPER, MARTIN, JENSEN, MAICHEL
AND HETLAGE

By /s/ Audrey G. Fleissig
AUDREY FLEISSIG
720 Olive Street, 24th Floor
St. Louis, Missouri 63101
(314) 421-3850

Attorneys for
SHELDON BARUCH TOIBB

AMENDED

Schedule A-3—Creditors having unscured claims without priority.

Name of creditor (including last known holder of any negotiable instrument) and complete mailing address including zip code.	Specify when claim was incurred and the consideration therefor; when claim is contingent, unliquidated, disputed, subject to setoff, evidenced by a judgment, negotiable instrument, or other writing, or incurred as partner or joint contractor, so indicate; specify name of any partner or joint contractor on any debt.	Indicate if claim is contingent, unliquidated, or disputed.	Amount of claim.
Stieferman Bros. Van & Storage 10899 Indian Head Industrial Blvd. St. Louis MO 63132	moving and storage charges incurred September 1986 and after.		$ 1,958.35
Washington University Supervisor of Student Loans Lindell & Skinker Blvds. St. Louis MO 63130 Loan No. 76578	school loan incurred 1972		882.03
Washington University Supervisor of Student Loans Lindell & Skinker Blvds. St. Louis MO 63130 Loan No. 76578	school loan incurred 1972		3,084.01
Yeshiva University 55 Fifth Ave. New York NY 10003 and American National Education Coop 33 North LaSalle St. Chicago IL 60678 Loan No. 30-0071-007142056-A	school loan incurred 1969		174.28
		Total	6098.67

Summary of debts and property.

[From the statements of the debtor in Schedules A and B]

Schedule			Total
	DEBTS		$
A-1/a,b	Wages, etc. having priority		0
A-1(c)	Deposits of money		0
A-1/d(1)	Taxes owing United States	(disputed)	4,200.63
A-1/d(2)	Taxes owing states		0
A-1/d(3)	Taxes owing other taxing authorities		0
A-2	Secured claims		unknown
A-3	Unsecured claims without priority		137,619.34
		Schedule A Total	141,819.97
	PROPERTY		
B-1	Real property [total value]		0
B-2/a	Cash on hand		20.00
B-2/b	Deposits		0
B-2/c	Household goods		100.00
B-2/d	Books, pictures, and collections		0
B-2/e	Wearing apparel and personal possessions		250.00
B-2/f	Automobiles and other vehicles		800.00
B-2/g	Boats, motors, and accessories		0
B-2/h	Livestock and other animals		0
B-2/i	Farming supplies and implements		0
B-2/j	Office equipment and supplies		0
B-2/k	Machinery, equipment, and supplies used in business		0

B-2/l	Inventory		0
B-2/m	Other tangible personal property		0
B-2/n	Patents and other general intangibles		0
B-2/o	Bonds and other instruments		0
B-2/p	Other liquidated debts		0
B-2/q	Contingent and unliquidated claims		unknown
B-2/r	Interests in insurance policies		0
B-2/s	Annuities		0
B-2/t	Interests in corporations and unincorporated companies		unknown
B-2/u	Interests in partnerships		0
B-2/v	Equitable and future interests, rights, and powers in personality		0
B-3/b	Property assigned for benefit of creditors		0
B-3/a	Property not otherwise scheduled		0
		Schedule B total	1,170.00

Unsworn Declaration under Penalty of Perjury of Individual to Schedules A and B

I, Sheldon Toibb, declare under penalty of perjury that I have read the foregoing schedules, consisting of 12 sheets, and that they are true and correct to the best of my knowledge, information and belief.

Executed on February 1, 1988 Signature: Sheldon Toibb

We, ... and ..... declare under penalty of perjury that we have read the foregoing schedules, consisting of ..... sheets, and that they are true and correct to the best of our knowledge, information, and belief.

Executed on ..... Signature: .....

Signature: .....

List of Creditors Holding 20 Largest Unsecured Claims

Following is the list of the Debtor's creditors holding the 20 largest unsecured claims which is prepared in accordance with Rule 1007(d) for filing in this chapter 11 (*or* chapter 9) case. The list does not include (1) those persons who come within the definition of insider set forth in 11 U.S.C. § 101(25), (2) secured creditors unless the value of the collateral is such that the unsecured deficiency places the creditor among the holders of the 20 largest unsecured claims, or (3) governmental units.

Name of creditor and complete mailing address including zip code.	Name, telephone number and complete mailing address including zip code of employee, agent or department of creditor familiar with claim who may be contacted.	Nature of claim (trade debt, bank loan, type of judgment, etc.)	Indicate if claim is contingent, unliquidated, disputed or subject to setoff.	Amount of claim (if secured) also state value of security.
Beneficial National Bank, U.S.A. P.O. Box 1750 Wilmington DE 19899-1750		Mastercard and Visa credit card charges		12,170.40
Bank of America Bank Card Center P.O. Box 94116 Pasadena CA 91109		Visa credit card charges		8,082.01
Maryland Bank, N.A. P. O. Box 15020 Wilmington DE 19885-9971		Mastercard credit card charges		8,014.24
First American Bank of Washington 3700 Calvert St., N.W. Washington, D.C. 20007		Personal line of credit on checking account		7,392.96
John J. McGrath, M.D. Suite 107 1616 18th St., N.W. Washington, D.C. 20009		medical services		7,125.00
Royal Bank Mid-County and Mercantile Bank & Trust Co. Credit Card Center P. O. Box 108 St. Louis MO 63166		Visa credit card charges		6,932.75
Choice P. O. Box 391 Baltimore MD 12103-0352		credit card charges		6,851.05
American Express Travel Related Services Co., Inc. 777 American Expressway Ft. Lauderdale FL 33337		credit card charges		6,465.02
First Virginia Bank P. O. Box 807A Falls Church VA 22046-1698		Visa credit card charges		6,379.04
Indiana National Bank c/o Card Services One Indiana Square Indianapolis IN 46266		Visa credit card charges		6,279.00 and 6,210.50
First American Bank of Virginia P. O. Box 1307 McLean VA 22101		Visa credit card charges		6,067.39

Name of creditor and complete mailing address including zip code.	Name, telephone number and complete mailing address including zip code of employee, agent or department of creditor familiar with claim who may be contacted.	Nature of claim (trade debt, bank loan, type of judgment, etc.).	Indicate if claim is contingent, unliquidated, disputed or subject to setoff.	Amount of claim (if secured) also state value of security.
First Omni Bank Bank Card Center P. O. Box 800 Millsboro DE 19966		Visa and Mastercard credit and charges		4,248.89
Banc One Department 0553 Columbus OH 43271		Visa credit card charges		4,004.35
Bohemian Savings & Loan Assn. c/o Financial Card Center P. O. Box 85201 Lincoln NE 68501		Visa credit card charges		3,139.92
Washington University Supervisor of Student Loans Lindell & Skinker Blvds. St. Louis MO 63130		student loan		3,084.01
Sovran Bank P. O. Box 11125 Richmond VA 23230		Visa credit card charges		2,768.46
Sovran Bank P. O. Box 11125 Richmond VA 23230		Mastercard credit card charges		2,752.67
Allied Bond & Collection Agency 4800 Street Rd. Trevose PA 19047		Collection of Mastercard and Visa charges held by Beneficial Nt'l Bank. (Disputed)		2,676.98
Dickstein, Shapiro & Morin Attorneys at Law Suite 899 2101 "L" Street, N.W. Washington, D.C. 20037		Legal fees		2,666.07
The Halladay Corporation Suite 400 2121 Wisconsin Ave., N.W. Washington, D.C. 20007		Back rent		2,417.73

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Case No. 86-02881-BSS

IN RE: SHELDON BARUCH TOIBB, 494-50-3162,
Debtor.

PLAN OF REORGANIZATION

Dated: February 1, 1988

Sheldon Baruch Toibb (the "Debtor") proposes the following Plan of Reorganization pursuant to Section 1121(a) of the United States Bankruptcy Code, 11 U.S.C. Section 1121(a).

ARTICLE 1

DEFINITIONS

For purposes of this Plan of Reorganization, to the extent not otherwise provided herein, the following terms shall have the meanings herein set forth unless otherwise indicated, the singular shall include the plural and capitalized terms shall at all times refer to the terms as defined in this Article 1. A term used in the Plan that is not defined in this Plan but that is used in the Code shall have the meaning assigned to it in the Code.

1.1 *Administrative Claims*: Any cost, Claim or expense of administration of the Chapter 11 case, or the Chapter 7 case of which this Chapter 11 case was converted, allowed and entitled to priority in accordance with the provisions of Sections 503(b) and 507(a)(1) of the Code, including, without limitation, any actual and

necessary expenses of preserving the Debtor's estate, including, withou limitation, all allowances of compensation or reimbursement of expenses to the extent allowed by the Court under Sections 330 or 503 of the Code, any fees or charges assessed against the Debtor's estate under Chapter 123 of title 28, United States Code.

1.2 *Allowed Claim*: Any Claim against the Debtor, provided: (a) proof of which was timely and properly filed or, if no proof of claim was filed, which has been or hereafter is listed by the Debtor on its schedules as liquidated in amount and not disputed or contingent and (b) in either such case, a Claim as to which no objection to the allowance thereof has been interposed on or before the Confirmation Date or such other applicable period of limitation fixed by the Code, the Rules or the Court, or as to which any objection has been determined by a Final Order to the extent such objection is determined in favor of a claimant. Unless otherwise specified herein or by order of the Court, "Allowed Claim" shall not include interest on such Claim for the period from and after the Petition Date.

1.3 *Allowed Unsecured Claim*: Any Allowed Claim which is not an Administrative Claim, Priority Claim or a Priority Tax Claim.

1.4 *Business Day*: Any day other than a Saturday, Sunday or a legal holiday as defined in Bankruptcy Rule 9006(a).

1.5 *Chapter 7 Trustee.* Stuart J. Radloff, who acted as the Chapter 7 trustee in the Chapter 7 case of which this Chapter 11 case was converted.

1.6 *Claim*: Any right to payment from the Debtor that arose on or before the Confirmation Date, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured; or any right to an equitable remedy for breach of per-

formance if such breach gives rise to a right of payment from the Debtor, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured or unsecured.

1.7 *Code*: The Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 11 U.S.C. Sections 101 *et seq.*, as amended by the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, as in effect on April 1, 1986.

1.8 *Confirmation Date*: The date of entry of the Confirmation Order in accordance with the provisions of the Code; provided, however, that if the Confirmation Order is stayed on motion pending appeal, then the Confirmation Date shall be the date of entry of the Final Order vacating such stay.

1.9 *Confirmation Order*: The Order of the Court (or District Court as the case may be) confirming the Plan pursuant to Section 1129 of the Code and approving the transactions contemplated therein.

1.10 *Court*: The United States Bankruptcy Court for the Eastern District of Missouri, Eastern Division, including the United States Bankruptcy Judge presiding in this case or such other Court as may have jurisdiction over Chapter 11 cases.

1.11 *Creditor*: A person that is the holder of a Claim against the Debtor that arose on or before the Petition Date, or a Claim against the Debtor's estate of any kind specified in Section 502(g), (h) or (i) of the Code.

1.12 *Debtor*: Sheldon B. Toibb—an individual.

1.13 *Disclosure Statement*: That certain disclosure statement approved in this Chapter 11 case accompanying the Plan.

1.14 *Disputed Claim*: Any Claim as to which an objection to the allowance thereof has been interposed and

which objection has not been determined by a Final Order; provided, however, that (a) with respect to any Disputed Claim for which a proof of claim has not been filed with the Court in the amount of a sum certain and which has not been fixed by the Court at a sum certain (a "Contingent Claim"), the amount of such Contingent Claim shall for purposes of the Plan be fixed or liquidated by the Court under Section 502 of the Code or may be fixed by agreement in writing between the Debtor and the holder thereof; and (b) the amount of the Disputed Claim may be such lesser amount than the amount in which such Disputed Claim was filed as the Court may order or the Debtor and the holder of such Disputed Claim shall agree upon in writing; provided, further, that in no event shall any holder of a Disputed Claim, if and when such Disputed Claim becomes an Allowed Claim, be entitled to receive an amount greater than the amount reserved for such Disputed Claim.

1.15 *Effective Date*: The first Business Day occurring on or after the eleventh (11th) day after the Confirmation Date; provided, however, that if a stay of the Confirmation Order is in effect on such day, then the Effective Date shall be the first Business Day thereafter on which (a) no stay of the Confirmation Order is in effect and (b) the Confirmation Order has not been vacated.

1.16 *Final Order*: An order or judgment of the Court which (a) has not been reversed, stayed, modified or amended, and as to which the time to appeal or seek review or rehearing has expired and as to which any right to appeal, reargue, petition for certiorari or rehearing has been waived in a manner satisfactory to the Debtor, as a result of which such order shall have become final in accordance with applicable law or (b) if an appeal, reargument, petition for certiorari or rehearing has been sought, the order of the lower court has been affirmed by the higher court to which the order was

appealed or from which the reargument or rehearing was sought or certiorari has been denied and time to take further appeal or to seek certiorari or further reargument or rehearing has expired.

1.17 *IEC Stock*: The 400 shares of stock of Independence Electric Corporation owned by the Debtor.

1.18 *Petition Date*: October 2, 1987, the date the voluntary petition commencing the Chapter 7 case was converted to a case under Chapter 11.

1.19 *Plan*: This Plan of Reorganization proposed by the Debtor either in its present form or as it may be amended or modified from time to time.

1.20 *Priority Claims*: Claims entitled to priority under Sections 507(a)(2), (a)(3), (a)(4), (a)(5) and (a)(6) of the Code.

1.21 *Priority Tax Claims*: Claims entitled to priority under Section 507(a)(7) of the Code.

1.22 *Pro Rata*: The proportion that the amount of a Claim in a particular class bears to the aggregate amount of all Claims which are entitled to a particular distribution (including Disputed Claims until disallowed or allowed in whole or in part) in such class.

1.23 *Rules*: The rules of bankruptcy procedure recommended by the Judicial Conference of the United States, as prescribed by the Supreme Court of the United States, effective August 1, 1983 in accordance with the provisions of 28 U.S.C. Section 2075, as the same shall be amended from time to time.

The words "herein," "hereof" and "hereunder" and other words of similar import refer to the Plan as a whole and not to any particular section, subsection or clause contained in the Plan.

ARTICLE 2

CLASSIFICATION OF CLAIMS AND INTERESTS

2.1 Administrative Claims: As defined in paragraph 1.1 above.

2.2 Priority Claims: As defined in paragraph 1.20 above.

2.3 Priority Tax Claims: As defined in paragraph 1.21 above.

2.4 Class 1: Allowed Unsecured Claim.

ARTICLE 3

TREATMENT OF ADMINISTRATIVE CLAIMS

All Administrative Claims shall be paid in full, in cash, and in such amounts as are allowed by the Court (a) on the later of 10 days after the entry of a Final Order of the Court allowing such Administrative Claim or 10 days after the Effective Date or (b) upon such other terms and conditions as may be agreed upon between the holder of an Administrative Claim and the Debtor.

ARTICLE 4

TREATMENT OF PRIORITY CLAIMS

All Priority Claims shall be paid in full, in cash, and in such amounts as are allowed by the Court (a) on the later of 10 days after the entry of a Final Order of the Court allowing such Priority Claim or 10 days after the Effective Date or (b) upon such other terms and conditions as may be agreed upon between the holder of a Priority Claim and the Debtor.

ARTICLE 5

TREATMENT OF PRIORITY TAX CLAIMS

All Priority Tax Claims shall be paid in full in cash, 10 days after the Effective Date if the parties agree upon

the amount of such claim by such time, or if such agreement cannot be reached, 10 days after the entry of a Final Order of the Court determining the amount of such claim.

ARTICLE 6

TREATMENT OF CLASS 1 CLAIMS

The Debtor shall pay to the Class 1 Creditors the amount of $25,000, less Administrative Claims, Priority Claims and Priority Tax Claims. In addition, the Class 1 Creditors shall be granted a right, for a period of six (6) years, to receive on a Pro Rata basis, fifty percent (50%) of any dividends (or other forms of distributions) received on the IEC Stock, up to full payment of the principle amount of the claim. The Debtor shall retain the right to receive the other 50% of dividends on the IEC Stock. In addition, if during the six (6) year period beginning on the Confirmation Date the Debtor sells any or all of the IEC Stock, 50% of the proceeds from such sale shall be distributed on a Pro Rata basis to the Class 1 Creditors.

ARTICLE 7

ADDITIONAL PROVISIONS FOR TREATMENT OF IMPAIRED CLASSES

(CLASS 1)

All impaired classes of Claims shall receive the treatment set forth in the Plan on account of and in complete satisfaction of all such Allowed Claims. Without limiting the foregoing and upon the Effective Date, each holder of a Claim by virtue of (i) the acceptance of the Plan by the requisite number and amount of members of its Class, (ii) the acceptance of the Plan by such Creditor, (iii) the acceptance by such Creditor of any payment made or consideration given under the Plan, or (iv) the confirmation of the Plan, shall be deemed to have assigned to the Debtor and all such parties shall be deemed to have waived, relinquished and released any and all of their

rights and Claims (other than as provided for in the Plan or the Confirmation Order) against the Debtor (to the extent provided for in the Plan).

ARTICLE 8

MEANS FOR EXECUTION OF THE PLAN

8.1 *Funds for Payment*: It is anticipated that the only Administrative Claims will be that of the Debtor's legal counsel for fees and expenses, including the filing fee, (estimated at $7,600.00, of which $4,000 has been deposited pursuant to a retainer approved by the Court) and of the Chapter 7 Trustee ($500.00) and his counsel ($1,696.25). It is not anticipated that there will be any Priority Claims and the only Priority Tax Claim is of the Internal Revenue Service ($4,200.63) which the Debtor has listed as disputed. In order to pay the Administrative Claims, Priority Claims, and Priority Tax Claims and to fund the initial payments to the Class 1 Creditors, the Debtor will borrow $25,000 from an independent third party at such interest rate and maturing at such time as the parties thereto may agree.

8.2 *Unclaimed Distributions*: Any distribution to which a Creditor is entitled and which such Creditor has not claimed on or before six months following the later of (a) six months following the Effective Date or (b) six months subsequent to the date upon which such Creditor's Claim becomes an Allowed Claim, and all interest earned thereon, shall be promptly delivered to the Debtor to be held in a special account subject to the Final Distribution provisions set forth below. At the end of said period set for Final Distribution, the holders of Allowed Claims theretofore entitled to distributions which were unclaimed shall cease to be entitled thereto, and the Debtor shall distribute the unclaimed distributions plus earned interest thereon Pro Rata to Class 1 Creditors.

8.3 *Final Distribution*: On the later of (a) the date on which all Claims in each class of Allowed Claims are

resolved and (b) six years following the Effective Date, as the case may be, the Debtor shall make a final recalculation of the distributions to the holders of Allowed Claims in each Class, taking into account the resolution of disputed contested claims (the interest earned on any reserved amount for contested claims shall inure to the benefit of the Debtor) and distributions previously made and permitted under the Plan. Upon completion of such final recalculations for each Class of Allowed Claims, there shall be released from the respective funds to the holders of Allowed Claims in such Class all reserved funds not previously used to pay contested claims. Any property not otherwise distributed pursuant to the foregoing shall become the sole and exclusive property of the Debtor.

ARTICLE 9

REJECTION OF EXECUTORY CONTRACTS AND UNEXPIRED LEASES

All executory contracts and unexpired leases of the Debtor entered into prior to the Petition Date, and which are neither assumed pursuant to Section 365 of the Code prior to the Confirmation Date, nor assumed under the Plan, shall be deemed rejected upon the Confirmation Date. Each non-Debtor party to an executory contract or an unexpired lease rejected hereunder, or pursuant to prior order of the Court, shall have thirty (30) days subsequent to the Confirmation Date to file a proof of claim with the Court asserting damages arising from such rejection, and the Debtor reserves the right to file an objection to any such claim.

ARTICLE 10

DISCHARGE

Except as otherwise provided in the Plan or the Confirmation Order, pursuant to Section 1141(d)(1) of the Code, entry of the Confirmation Order acts as a discharge,

effective as of the Effective Date, of any and all debts of the Debtor that arose at any time before the entry of the Confirmation Order, including, but not limited to, all principal and any interest accrued thereon. The discharge of the Debtor shall be effective as to each Claim, regardless of whether a proof of claim therefore was filed, whether the claim is an Allowed Claim, or whether the holder thereof votes to accept the Plan.

ARTICLE 11

RETENTION AND ENFORCEMENT OF CLAIMS

Pursuant to Section 112(b)(3) of the Code, the Debtor shall retain and may enforce any and all Claims of the Debtor.

ARTICLE 12

MODIFICATION OF THE PLAN

12.1 Modifications of the Plan may be proposed in writing by the Debtor at any time before confirmation, provided that such Plan, as modified, meets the requirements of Sections 1122 and 1123 of the Code, and the Debtor shall have complied with Section 1125 of the Code.

12.2 The Plan may be modified at any time after confirmation and before its substantial consummation, provided that such Plan, as modified, meets the requirements of Sections 1122 and 1123 of the Code, and the Court, after notice and a hearing, confirms such Plan, as modified, under section 1129 of the Code, and the circumstances warrant such modification.

12.3 A holder of a claim that has accepted or rejected the Plan shall be deemed to have accepted or rejected, as the case may be, such Plan as modified, unless, within the time specified by the Court, such holder changes its previous acceptance or rejection.

ARTICLE 13

GENERAL PROVISIONS

13.1 *Extension of Payment Dates.* If any installment payment under the Plan falls due on a Saturday, Sunday or other day which is not a Business Day, then such due date shall be extended to the next following Business Day.

13.2 *Notices.* Any notice hereunder to the Debtor shall be in writing, and if by telegram or telex, shall be deemed to have been given when sent, and if by mail, shall be deemed to have been given three (3) days after the date when sent by registered or certified mail, postage prepaid, and addressed to the Debtor as follows:

Sheldon B. Toibb
8640 Olive Street Rd.
St. Louis, MO 63132

and a copy to:

Peper, Martin, Jensen, Maichel and Hetlage
720 Olive Street—Twenty-Fourth Floor
St. Louis, Missouri 63101
Attention: Audrey G. Fleissig

13.3 *Captions*: Section captions used in the Plan are for convenience only and shall not affect the construction of the Plan.

13.4 *Severability*: Should any provision in the Plan be determined to be unenforceable, such determination shall in no way limit or affect the enforceability and operative effect of any other provision of the Plan.

13.5 *Successors and Assigns*: The rights and obligations of any person named or referred to in the Plan shall be binding upon, and shall inure to the benefit of the successors or assigns of such person.

ARTICLE 14

PROCEDURES FOR RESOLVING CONTESTED CLAIMS

14.1 Objections to Claims shall be filed with the Court and served upon each holder of each of the Claims to which objections are made not later than 120 days subsequent to the Confirmation Date.

14.2 Payments and distributions to each holder of a contested claim that ultimately becomes an Allowed Claim shall be made in accordance with the provisions of the Plan with respect to the Class of Creditors to which the respective holder of an Allowed Claim belongs. Interest on any funds reserved for a contested claim shall inure to the benefit of the Debtor. Such payments and distributions shall be made as soon as practicable after the date that the order or judgment allowing such Claim is a Final Order.

ARTICLE 15

RETENTION OF JURISDICTION

Notwithstanding confirmation of this Plan, the Court shall retain jurisdiction for the following purposes:

(a) Determination of the allowability of Claims and interests upon objection to such Claims by the Debtor or by any other party in interest;

(b) Determination of requests for payment to professional persons and Claims entitled to priority under Sections 503 and 507 of the Code, including compensation of parties entitled thereto;

(c) Implementation of the provisions of the Plan and entry of orders in aid of confirmation of the Plan, including, without limitation, appropriate orders to protect the Debtor and its successors from Creditor action;

(d) Modification of the Plan pursuant to Section 1127 of the Bankruptcy Code;

(e) Adjudication of any causes of action, including avoiding power actions brought by the Debtor;

(f) Determination of any issues raised by papers filed with the Court on or before the Confirmation Date; and

(g) Entry of a final decree closing the Debtor's case.

By /s/ Sheldon Baruch Toibb
SHELDON BARUCH TOIBB

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Case No. 86-02881-BSS

IN RE: SHELDON BARUCH TOIBB, 494-50-3162,
Debtor.

BALLOT FOR ACCEPTING OR REJECTING PLAN

Filed by ———————— on ————————.

The plan referred to in this ballot can be confirmed by the court and thereby made binding on you if it is accepted by the holders of two-thirds in amount and more than one-half in number of claims in each class voting on the plan. In the event the requisite acceptances are not obtained, the court may nevertheless confirm the plan if the court finds that the plan accords fair and equitable treatment to the class rejecting it. To have your vote count you must complete and return this ballot.

The undersigned, a creditor of the above-named Debtor in the unpaid principal amount of $————.

[Check One] —— Accepts

—— Rejects

the plan for the reorganization of the above-named Debtor.

Print or type name: ————————

Signed: ————————

Return this ballot on or before ————, 1988.

To:

Name: ————————

Address: ————————

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Case No. 86-02881-BSS

IN RE: SHELDON BARUCH TOIBB, 494-50-3162,
Debtor.

DISCLOSURE STATEMENT

Dated: February 1, 1988

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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Case No. 86-02881-BSS

IN RE: SHELDON BARUCH TOIBB, 494-50-3162,
Debtor.

DISCLOSURE STATEMENT

I. INTRODUCTION

A. *Purpose of Disclosure Statement*

Sheldon Baruch Toibb (the "Debtor") is providing this Disclosure Statement ("Disclosure Statement") to all known Creditors, pursuant to Section 125 of the Bankruptcy Reform Act of 1978 (Pub. L. 95-598), 11 U.S.C. § 101 *et seq.*, as amended ("Bankruptcy Code"), in order to permit each Creditor of the Debtor to make an informed judgment in exercising their right to vote on the Plan of Reorganization of the Debtor dated February 2, 1988 (the "Plan") described below. A copy of the Plan is attached hereto.

B. *Source of Information*

Except as otherwise expressly indicated, all information contained in this Discolsure Statement has been furnished by the Debtor.

C. *Filing of Bankruptcy Petition*

On November 18, 1986, the Debtor filed a voluntary petition for liquidation under Chapter 7 of the Bankruptcy Code in the United States Bankruptcy Court for the Eastern District of Missouri, Eastern Division

("Bankruptcy Court") as Case No. 86-02881-BSS. Stuart J. Radloff was appointed as Chapter 7 Trustee (the "Chapter 7 Trustee"). On October 2, 1987, an order was entered by the Bankruptcy Court converting this case to a case under Chapter 11 of the Bankruptcy Code and granting relief under said chapter.

As of the date of this Disclosure Statement, the Bankruptcy Court has not appointed a committee of unsecured creditors. Given the relatively small number of Creditors of the Debtor, it is not anticipated that the Bankruptcy Court will appoint a committee of unsecured creditors.

D. *Manner of Voting on Plan*

All Creditors entitled to vote on the Plan may cast their votes for or against the Plan by completing, dating and signing the ballot for accepting or rejecting the Plan ("Ballot") accompanying this Disclosure Statement and filing it with the Bankruptcy Court. Such filings may be accomplished personally or by mailing Ballots to the Clerk of the Bankruptcy Court at 1114 Market Street, St. Louis, Missouri 63101-2043. In order to be counted, all Ballots must be filed or received by the Bankruptcy Court on or before ————————, 1988.

E. *Confirmation of Plan*

1. *Solicitation of Acceptances*

This Disclosure Statement has been approved by the Bankruptcy Court in accordance with Section 1125 of the Bankruptcy Code and Bankruptcy Rule 3006 and is provided to each Creditor of the Debtor whose claim or interest has been scheduled by the Debtor or who has filed a proof of claim against the Debtor. This Disclosure Statement is intended to assist Creditors whose claims are impaired in evaluating the Plan and in determining whether to accept or reject the Plan. Under the Bankruptcy Code, acceptance or rejection of the Plan may not

be solicited unless a copy of this Disclosure Statement is furnished prior to or concurrently with such solicitation.

THE BANKRUPTCY COURT'S APPROVAL OF THIS DISCLOSURE STATEMENT DOES NOT CONSTITUTE A RECOMMENDATION BY THE BANKRUPTCY COURT EITHER "FOR" OR "AGAINST" THE PLAN.

THIS DISCLOSURE STATEMENT HAS NOT BEEN APPROVED OR DISAPPROVED BY THE SECURITIES AND EXCHANGE COMMISSION NOR HAS THE COMMISSION PASSED ON THE ACCURACY OR ADEQUACY OF THE STATEMENTS CONTAINED HEREIN.

NO REPRESENTATIONS CONCERNING THE DEBTOR ARE AUTHORIZED OTHER THAN AS SET FORTH IN THIS DISCLOSURE STATEMENT OR AS OTHERWISE AUTHORIZED BY THE BANKRUPTCY COURT. ANY REPRESENTATION OR INDUCEMENT MADE TO SECURE YOUR ACCEPTANCE OF THE PLAN WHICH IS OTHER THAN AS CONTAINED IN THIS DISCLOSURE STATEMENT OR AS AUTHORIZED BY THE BANKRUPTCY COURT SHOULD NOT BE RELIED ON BY YOU IN ARRIVING AT YOUR DECISION, AND ANY SUCH ADDITIONAL REPRESENTATION OR INDUCEMENT SHOULD BE REPORTED TO THE BANKRUPTCY COURT.

2. *Persons Entitled to Vote on Plan*

Only those classes of claims which are impaired by the Plan are entitled to vote on the Plan. Generally, and subject to the specific provisions of Section 1124 of the Bankruptcy Code, an impaired class includes a class of claims which, under the Plan, will receive less than payment in full in cash of the allowed amounts of their respective claims on the "Effective Date" (The Plan defines "Effective Date" as: "the first business day occurring on or after the eleventh (11th) day after the Confirmation Date; provided, however, that if a stay of the Confirmation Order is in effect on such first business day, then the Effective Date shall be the first business day thereafter on which (a) no stay of the Confirmation Order is in effect and (b) the Confirmation Order has not been vacated"); has its legal, equitable or contractual rights altered by the Plan; or will not receive payment on account thereof in accordance with expected commercial practice. The classes which are not impaired by the Plan are Administrative Claims, Priority Claims and Priority Tax Claims. All other classes of claims are impaired by the Plan. (*See* "Plan of Reorganization—Classes of Claims" and "Plan of Reorganization—Treatment of Claims Impaired by the Plan").

In determining acceptance of the Plan, votes will be counted only if submitted by a Creditor whose claim is scheduled by the Debtor as undisputed, non-contingent and liquidated, or who timely filed with the Bankruptcy Court a proof of claim which has not been disallowed, disqualified or suspended prior to computation of the vote on the Plan. The Ballot which accompanies this Disclosure Statement does not constitute a proof of claim. If you are uncertain whether your claim has been correctly scheduled, you should check the Debtor's schedules which are on file with, and may be inspected at, the Bankruptcy Court. THE BANKRUPTCY COURT HAS SET FEBRUARY 16, 1988 AS A BAR DATE FOR FILING A PROOF OF CLAIM. DISPUTED CLAIMS NOT FILED BY THE BAR DATE GENERALLY ARE NOT ALLOWED.

3. *Hearing on Confirmation of Plan*

The Bankruptcy Court has set ————————, 1988 at ——— as the time for the hearing to determine whether the Plan has been accepted by the requisite number of

Creditors and whether the other requirements for confirmation of the Plan have been satisfied. Objections to Confirmation of the Plan must be in writing and filed on or before ————————, 1988 with the Clerk of the Bankruptcy Court at 1114 Market Street, St. Louis, Missouri 63101-2043, *and* served on Counsel for the Debtor, Peper, Martin, Jensen, Maichel and Hetlage, Twenty-Fourth Floor, 720 Olive Street, St. Louis, Missouri 63101, Attention: Audrey G. Fleissig. The hearing may be continued from time to time without further notice to you other than the announcement in open court of the continued date.

4. *Acceptances Necessary to Confirm Plan*

At the confirmation hearing, the Bankruptcy Court must determine, among other things, whether the Plan has been accepted by each class (a "Class") of claims whose claims are impaired by the Plan. Under Section 1126 of the Bankruptcy Code, an impaired Class is deemed to have accepted the Plan if (a) at least two-thirds in dollar amount and (b) more than one-half in number of those claims which have actually voted on the Plan have voted to accept the Plan. Further, unless there is unanimous acceptance of the Plan by an impaired Class, the Bankruptcy Court must also determine that under the Plan each claimant of that Class will receive property of a value, as of the Effective Date of the Plan, that is not less than the amount that such claimant would receive or retain if the Debtor's property were liquidated under Chapter 7 of the Bankruptcy Code on the Effective Date of the Plan. If the Debtor's property were liquidated under Chapter 7 of the Bankruptcy Code, the Debtor believes general unsecured creditors would receive nominal payments on account of their claims. By comparison, the Plan offers general unsecured creditors distributions equal to the amount the general unsecured creditors would receive under a Chapter 7 liquidation, plus the opportunity to receive additional sums over a six year period. (*See* "Plan and Reorganization—Funding of Plan").

5. *Confirmation of Plan Without Necessary Acceptances*

The Plan may be confirmed even if it is not accepted by all of the impaired Classes if the Bankruptcy Court finds that the Plan was accepted by at least one impaired Class and complies with the requirements of Section 1129 (a), other than paragraph 8, of the Bankruptcy Code, and does not discriminate unfairly against, and is fair and equitable as to, all non-accepting impaired Classes. This provision is set forth in Section 129(b) of the Bankruptcy Code. In seeking confirmation of the Plan, the Debtor intends to rely, if necessary, on Section 1129(b) of the Bankruptcy Code as to any non-accepting Classes.

II. PLAN OF REORGANIZATION

The following is a brief summary of certain of the more significant provisions of the Plan. Capitalized terms used but not defined in this Disclosure Statement have the meanings ascribed to them in the Plan. THIS SUMMARY IS QUALIFIED IN ITS ENTIRETY BY THE FULL TEXT OF THE PLAN ATTACHED HERETO, WHICH ALL CREDITORS ARE URGED TO REVIEW CAREFULLY.

A. *Classes of Claims*

In addition to Administrative Claims, Priority Claims and Priority Tax Claims, the Plan provides claims into one (1) separate class listed below.

Class 1: Allowed unsecured claims.

Administrative Claims: Costs or expenses of administration of the Debtor's reorganization which may be allowed and entitled to priority pursuant to Section 503

(b) and 507(a)(1) of the Bankruptcy Code, including any actual and necessary expenses of preserving the Debtor's estate, and all allowances, including professional fees and costs, that may be approved by the Bankruptcy Court in accordance with the Bankruptcy Code. It is anticipated that the only Administrative Claims will be those of the Debtor's legal counsel for fees and expenses, including the filing fee (estimated at $7,600.00, of which $4,000 has been deposited pursuant to a retainer approved by the Court), the Chapter 7 Trustee ($500.00), and (iii) the attorney for the Chapter 7 Trustee ($1,696.25).

Priority Claims: Claims entitled to priority under Section 507(a)(2), (a)(3), (a)(4), (a)(5) and (a)(6) of the Bankruptcy Code. The Debtor did not schedule any claims under these sections of the Bankruptcy Code and does not believe any such claims will be filed. However, in the event one or more proofs of claim are filed asserting such priority status, and if any such claim is ultimately allowed by the Bankruptcy Court as a priority claim under any of the foregoing sections of the Bankruptcy Code, the Debtor will pay in full such priority claims in cash.

Priority Tax Claims: Claims entitled to priority under Section 507(a)(7) of the Bankruptcy Code. The Debtor has listed as disputed the claim of the Internal Revenue Service in the amount of $4,200.63. The amount of the claim of the Internal Revenue Service shall be as established by the Bankruptcy Court or as may be agreed upon by the parties.

B. *Treatment of Claims Not Impaired by the Plan (Administrative Claims, Priority Claims, and Priority Tax Claims)*

Ecrh Administrative Claim, Priority Claim and Priority Tax Claim will be paid in cash in full within 10 days of the entry of an order of the Bankruptcy Court allowing such Administrative Claim or Priority Claim or Priority Tax Claim or within 10 days of the Effective Date, whichever is later, or upon such other terms and conditions as may be agreed upon between the holder of such Administrative Claim or Priority Claim or Priority Tax Claim and the Debtor.

C. *Treatment of Claims Impaired by the Plan*

Class 1: Within 10 days of the Effective Date, the Debtor will pay to the Class 1 Creditors on a Pro Rata basis an amount equal to $25,000 less than the amounts of the Administrative Claims, Priority Claims and Priority Tax Claims. The Debtor estimates that after payment of Administrative Claims, Priority Claims and Priority Tax Claims $15,000 will be available for Class 1 creditors. Based upon the schedules of the Debtor which lists $137,619 of unsecured claims, each Class 1 creditor will receive approximately 11% of its allowed unsecured claim. In addition, for a period of six (6) years beginning on the Effective Date the Debtor will pay to the Class 1 creditors of the principal amount of the claim 50% of all amounts received as dividends that the Debtor receives on his 400 shares of stock of Independence Electric Corporation ("IEC Stock") and will pay to the Class 1 creditors on a Pro Rata basis 50% of any proceeds realized by the Debtor upon the sale of any or all of the shares of IEC Stock during such six (6) year period. (*See* "Description of Independence Electric Corporation.")

D. *Additional Provisions for Treatment of Impaired Classes*

All impaired classes of claims shall receive the treatment set forth in the Plan on account of and in complete satisfaction of all such allowed claims. Without limiting the foregoing and upon the Effective Date, each holder of a claim by virtue of (i) the acceptance of the Plan by

the requisite number and amount of members of its Class, (ii) the acceptance of the Plan by such Creditor, (iii) the acceptance by such Creditor of any payment made or consideration given under the Plan, or (iv) the confirmation of the Plan, shall be deemed to have waived, relinquished and released any and all of their rights and claims (other than as provided for in the Plan or the Confirmation Order) against the Debtor (to the extent provided for in the Plan).

E. *Funding of Plan*

The Debtor has obtained a commitment for a loan of $25,000.00 which will be used to fund the Plan of Reorganization. The $25,000.00 loan will be unsecured and shall bear such interest rate and mature at such time as the parties thereto may agree. The loan will be repaid from the Debtor's personal income that is earned subsequent to the Confirmation Date, including Debtor's 50% of any dividends on the IEC Stock.

The Debtor will agree not to encumber the IEC Stock nor dispose of any shares of IEC Stock except to a bona fide purchaser at an arm's length transaction. The Debtor, however, is not granting an interest in the IEC Stock to the creditors but is merely promising to pay the creditors a portion of cash payments he may receive relating to the IEC Stock. As of the date hereof, there has never been any dividends declared on the IEC Stock and the Debtor cannot state with any certainty whether or not any dividends will be declared in the next 6 years. Furthermore, since only two other individuals own stock in Independence Electric Corporation ("IEC"), the Debtor cannot state with any certainty whether or not there will be a market for his 400 shares of IEC Stock if he subsequently determines to sell any or all of such shares. (*See* "Description of Independence Electric Corporation.")

F. *Income Tax Consequences of the Plan*

THE TAX CONSEQUENCES OF CONFIRMATION OF THE PLAN MAY VARY BASED ON THE INDIVIDUAL CIRCUMSTANCES OF PERSONS RECEIVING DISTRIBUTIONS OR PROPERTY UNDER THE PLAN. NO RULING HAS BEEN REQUESTED OR OBTAINED FROM THE INTERNAL REVENUE SERVICE CONCERNING THE TAX ASPECTS OF THE PLAN. EACH HOLDER OF A CLAIM IS URGED TO CONSULT WITH HIS, HER OR ITS OWN TAX ADVISORS TO ASCERTAIN THE ACTUAL TAX CONSEQUENCES TO SUCH HOLDER UNDER FEDERAL AND APPLICABLE STATE LAWS OF CONFIRMATION AND CONSUMMATION OF THE PLAN.

THE FOREGOING IS A SUMMARY OF THE PLAN AND SHOULD NOT BE RELIED ON FOR VOTING PURPOSES. CREDITORS ARE URGED TO READ THE PLAN IN FULL. CREDITORS ARE FURTHER URGED TO CONSULT WITH COUNSEL OR WITH EACH OTHER IN ORDER TO FULLY UNDERSTAND THE PLAN. THE PLAN IS COMPLEX INASMUCH AS IT REPRESENTS A PROPOSED LEGALLY BINDING AGREEMENT, AND INTELLIGENT JUDGMENT CONCERNING THE PLAN CANNOT BE MADE WITHOUT UDERSTANDING IT.

III. DESCRIPTION OF THE DEBTOR

The Debtor is a self-employed individual who has an energy consulting practice which includes strategic planning in the marketing and economic generation of electricity, advice, and the formulation of positions
Rabbinical College Building Fund. It is not anticipated that either of these activities of the Debtor will generate income in excess of what the Debtor needs for normal living expenses and therefore, none of such income is being used to fund the Plan of Reorganization.

IV. DESCRIPTION OF INDEPENDENCE ELECTRIC CORPORATION

The Debtor owns 400 shares of IEC Stock which represents 24% of the outstanding stock. There are two other shareholders who own the remaining 76% of the outstanding stock. IEC is a Delaware corporation incorporated in 1983 with its principal place of business in Washington, D.C. IEC was organized to develop and operate low-head hydroelectric power stations as an independent small power producer under provision of the Public Utility Regulatory Policies Act.

Effective August 1, 1987, IEC received from the Federal Energy Regulatory Commission ("FERC") an exclusive license to construct and operate for 40 years a hydroelectric power project on the Pearl River in the State of Mississippi. The estimated size of the project is 9.5 megawatts.

A condition of the original license requires that construction begin by August 1, 1989, and must be completed by August 1, 1991. IEC has received a two year extension from the FERC to begin construction, and therefore must begin construction by August 1, 1991, and be finished by August 1, 1993. IEC's consulting engineering firm estimates that it would take two years to construct the power plant. The latest available construction cost estimate for the plant is $20,000,000.00.

Effective December 1, 1987, IEC received from FERC an exclusive license to construct and operate three hydroelectric projects in Alabama. The three sites are estimated to be 24 megawatts, 20 megawatts and 6 megawatts in size. A condition in each of the three licenses requires that construction begin no later than December 1, 1989, and be completed by December 1, 1991. No extension of time has been applied for any of these three sites. IEC's consulting engineering firm estimates it would take two years to construct each of these three licensed sites.

The latest estimated construction cost for the larger two sites is $40,000,000.00 each, and $20,000,000.00 for the smallest site.

IEC has a license application pending for another site in Alabama, which is estimated to be 26 megawatts in size and to have a construction cost of $47,500,000.00. IEC is one of two competing applicants for this license. It is anticipated that FERC may issue the license in approximately June of 1988.

IEC has spent approximately $1,100,000.00 in developing its license applications. In a letter dated April 20, 1987, Michael Cardozo, who represented himself to be acting on behalf of the corporation, advised the former Trustee that as of the end of March, 1987, IEC had $4,210.00 in cash, unpaid liabilities to suppliers of approximately $268,810.00, and also stated it had loans due a shareholder (not the Debtor) of $372,000.00. The Debtor has no information that indicates the asserted liabilities have been paid. IEC's consulting engineering firm has notified it that the FERC is requiring $75,000.00 of postlicensing studies to be done with respect to the Pearl River dam site, and $5,000.00 of work on each of the three licensed Alabama sites. All of this work must be completed by June 1, 1988. The consulting engineering company is requiring that IEC, or its individual shareholders, prepay in full the $90,000.00 in order for it to complete the work.

IEC's future is uncertain. The Debtor does not know whether or not the funds needed for the engineering work, the preconstruction tasks or for the large amounts of construction capital needed for each site will be forthcoming or in what form if such capital is available.

V. *Financial Information Concerning the Debtor*

During the four month period beginning October, 1987 and ending January 31, 1988, the Debtor earned approximately $2,200.00 from his fundraising operation. How-

ever, this amount was not sufficient to cover total expenses, and the Debtor received additional support from family members. As of the date hereof, all expenses incurred after the case was converted to Chapter 11 have been or are being paid on a current basis.

The only assets of the Debtor are personal belongings and 400 shares of IEC Stock. Prior to the conversion of this case from Chapter 7 to Chapter 11, the Chapter 7 Trustee attempted to sell the IEC Stock. On August 6, 1987, the Chapter 7 Trustee filed a notice of a proposed sale for the 400 shares of IEC Stock for $25,000.

VI. *Analysis of Liquidation*

In a liquidation proceeding all of the Debtor's personal belongings would be exempt property not subject to distribution to the Debtor's creditors. The only asset available to the Debtor's creditors upon liquidation would be the 400 shares of IEC Stock. Except for the offer received by the Trustee, the Debtor is unaware of any current market for the shares. After negotiations with the other two shareholders of IEC, the Chapter 7 Trustee proposed to sell the IEC Stock to them for $25,000. If said sale had been consummated, the unsecured creditors of the Debtor would receive an amount, in the aggregate, equal to $25,000 less costs of administration (the fees and expenses of the Chapter 7 Trustee and his attorney and the claim of the Internal Revenue Service a priority claim in the event of liquidate).

The Plan of Reorganization proposed by the Debtor proposes to pay to the Debtor's creditors the $25,000 the Chapter 7 Trustee would have received for the sale of the IEC Stock (less costs of administration and Priority Tax Claims), and, in addition, provides that the Debtor's creditors will receive 50% of any payments Debtor may receive as dividends on the IEC Stock for a period of six (6) years beginning on the Effective Date and 50% of any proceeds realized by the Debtor if any or all of the

IEC Stock is sold by the Debtor within 6 years of the Effective Date. Therefore, the Plan of Reorganization proposes a payout to creditors of an amount at least equal to what the creditors would receive in a liquidation with the possibility of a greater return if the IEC Stock earns a dividend or if the Debtor sells the IEC Stock within the next 6 years.

Dated: February 1, 1988.

/s/ Sheldon Baruch Toibb
SHELDON BARUCH TOIBB

Attorney at Law

Member New York & U.S. Supreme Court Bars

Real Estate Investments

SIDNEY J. BROWN
University Plaza Office Bldg.
1835 University Boulevard
Hyattsville, Maryland 20783
(301) 422-3300

March 2, 1988

VIA PUROLATOR

Honorable Barry S. Schermer
United States Bankruptcy Judge
730 U.S. Courthouse
St. Louis, MO 63101

Re: Sheldon Toibb
Case No. 86-02-881-BSS
U.S. Bankruptcy Court for
the Eastern District of
Missouri

Dear Judge Schermer:

When Mr. Toibb filed a petition in bankruptcy which was a Chapter 7 proceeding, he advised the court that 400 shares of stock he owned in Independence Electric Corporation ("IEC") were of unknown value. At that time (and still true) the company debts were so great and the opportunity for obtaining capital was so remote that his statement was an accurate one.

However, since Mr. Toibb, while involved with the company as an employee created dissention, disagreement and an unhealthy atmosphere, if I and my fellow shareholders were to be able to realize anything from our $1,000,000+ investment and loans to the company, it was

necessary to avoid any further differences, disputes and contentiousness, and IEC was willing to pay what it considered a nuisance value sum of $25,000 to clear the air.

Thereafter Mr. Toibb, still wanting to hold on to the stock despite his indebtedness and his bankruptcy, filed a Chapter 11 proceeding and is now trying to involve his creditors in IEC's affairs by offering to pay them out of dividends to be received from IEC or from the sale of his stock.

However, Mr. Toibb properly sets forth the obvious valueness of his stock. Although, on the one hand he suggests dividends and the possible sale of the stock as a possible source of funds to pay creditors, he also, in the same breath accurately sets forth the Corporation's current indebtedness of $268,810 and the need for millions upon millions of dollars in order to create something out of the licenses.

He fails to mention that the licenses are in great jeopardy of being lost because there is no capital available in the area of millions of dollars just to process the necessary legal, engineering and other procedures required to keep them alive.

At I stated, Sheldon Tobbi's interjection of himself into the affairs of IEC when there was a need for him to allow the company to do what was necessary to develop the company, is now being embellished by trying to involve creditors by giving them an interest that can further impair any prospect for obtaining additional capital.

In an effort to try and salvage something from our large investment here, (as you well know Mr. Toibb made no cash investment and as a matter of fact received approximately $100,000 in compensation while he was associated with the company) and to try and meet IEC's creditor obligations, the Company needs to be free of conflicting demands so that it can act expeditiously

and responsibly in trying to avoid its own bankruptcy or other economic disaster.

Accordingly, I who have invested in the Corporation and loaned to it funds totaling in excess of $1,000,000 hereby personally offer to buy the 400 shares of IEC stock held by Mr. Toibb for $50,000. I am making this offer in order to rid the Corporation of this nuisance and to allow IEC to try and liquidate what it can, pay off its debts and maybe try to obtain a return of some of my capital.

Please accept this letter as an unconditional offer to buy Mr. Toibb's 400 shares of IEC stock for $50,000 and the release of any or all claims which Mr. Toibb may have against IEC, its shareholders, directors, officers, employees and agents. This offer shall be good for a period of 30 days from your receipt of this letter.

I am addressing this letter to the Court, with copies to Mr. Toibb and his attorney. I am assuming that this is an appropriate method of making this offer.

Very truly yours,

/s/ Sidney J. Brown
SIDNEY J. BROWN

SJB:pal

cc: Mr. Sheldon Toibb
Audrey G. Fleissig, Esq.

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Case No. 86-02881-BSS

IN RE: SHELDON BARUCH TOIBB,
Debtor.

TRANSCRIPT ON APPEAL

March 7, 1988

APPEARANCES

Peper, Martin, Jensen, Maichel & Hetlage, 720 Olive Street, 24th Floor, St. Louis, Missouri 63101, by Audrey Fleissig, Esq., appearing on behalf of debtor.

Stuart J. Radloff, Esq., 7777 Bonhomme, Clayton, Missouri 63105, appearing in his capacity as former trustee of the bankruptcy estate.

[2] INDEX

[3] The following cause came on for hearing before the Honorable Barry S. Schermer, Judge of the United States Bankruptcy Court, Eastern District of Missouri, Eastern Division, at St. Louis, on the 7th day of March, 1988.

The Debtor, Sheldon Baruch Toibb, was present in person and by attorney Audrey Fleissig.

The Trustee, Stuart Radloff, was present in person.

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[4] PROCEEDINGS

THE COURT: In the matter of Sheldon Toibb, may I have all parties of interest? Good morning.

MS. FLEISSIG: Good morning.

THE COURT: Did you receive any response to your disclosure statement?

MS. FLEISSIG: Your Honor, we have only received two documents which I believe the Court has also received. One was a personal letter from a Sidncy Brown—

THE COURT: Umm hmm.

MS. FLESSIG: —directed personally to your attention. The other was a letter from his attorney, Mr. Cardozo, which was hand delivered to us Friday at about 5:30. And—

THE COURT: I've received one of the two.

MS. FLESSIG: I'd be happy to show you a copy of the other, your Honor.

THE COURT: Thank you, ma'am.

MS. FLESSIG: Especially since the other purports to raise some objections to the disclosure statement itself.

THE COURT: All right.

MS. FLESSIG: Your Honor, perhaps while I'm pulling this out for you, I would like to [5] bring one thing to your attention in case you yourself did not recall. For a brief period after Mr. Toibb worked for the Car-

ter campaign, probably early in 1977, he was employed for a couple of months at the Susman, Schermer law firm.

THE COURT: He was indeed.

MS. FLEISSIG: And I don't believe he had any interaction with your Honor; but I wanted to make sure you were aware of that.

THE COURT: I do recall that. He was an employee of the firm at the same time I was an employee of the firm.

MS. FLEISSIG: That's correct. Okay.

THE COURT: Other than making the observation, do you wish to make any motion in respect of that?

MS. FLEISSIG: No, your Honor.

THE COURT: Okay.

MS. FLEISSIG: We think the relationship was so tenuous and so long ago that it wouldn't have any bearing.

THE COURT: Thank you. Mr. Cardozo's letter speaks to basically one issue I think, and that is the issue of an alleged restriction of sale.

MS. FLEISSIG: Yes; and I'm prepared to [6] address that first if you'd prefer, your Honor.

THE COURT: Sure, why don't you go ahead, since this is the only objection you've received.

MS. FLEISSIG: Certainly. We basically have two responses to that, your Honor. First of all, I don't believe that Mr. Cardozo has any standing to raise this objection. He is totally a stranger to this proceeding. IEC is not a creditor in this proceeding, neither is Mr. Brown, neither is Mr. Miller. And I have for your Honor the case of *Indianapsco* and especially the second page of that case, your Honor, relates strict—relates specifically to the standing of a stranger to the proceeding to object when no parties in interest have objected.

And that was objection to a proposed sale, but I would submit that the same applies here. He certainly does not fall within the people entitled to be heard under Section 11.09 of the Code. And to the extent that Mr. Brown is objecting to our plan of reorganization, it applies to him as well in substance. And that is a copy your Honor may retain.

THE COURT: Thank you.

MS. FLEISSIG: Speaking—even if there [7] were something to be heard from Mr. Cardozo, I do not believe that there are any objections of any substance that are in any manner material to this proceeding. Mr. Cardozo has attached several documents to his objection.

And if I can just speak to them in order; he argues that we are somehow making the creditors—involving the creditors of Mr. Toibb in the business of IEC. And that's nonsense, because we specifically state in our disclosure statement that we are not giving them a security interest; we are not assigning them any interest.

We merely say if Mr. Toibb ever receives any dividends, if he ever receives any proceeds from a sale of that stock he will pay over fifty percent to his creditors as a wholly unsecured promise.

Secondly, he says that there are restrictions on transfer which are not addressed. And I point out to your Honor that there are two separate agreements. One is a shareholder sales agreement, and the other agreement is a shareholder agreement.

THE COURT: Umm hmm.

MS. FLEISSIG: The shareholder sales agreement is the only agreement to which Mr. Toibb [8] is a party. That does not impose any prohibitions against Mr. Toibb transferring this stock for any period of time. It merely provides a first option to purchase to the corporation and if not taken by the corporation, to the remaining shareholders. That option expires in 1991, and that is all that they are given, is an option.

THE COURT: Or a first right.

MS. FLEISSIG: First right; certainly. And we would submit, your Honor, Mr. Toibb does not have any specific plans to sell that stock. Even if he did, there

would just be a first right to these individuals and the promise to pay half of the proceeds would still be valid.

And thirdly, that option expires in 1991. And the promise to pay the proceeds goes through 1994. Now, if your Honor thinks that it is material to disclose in any event, I would be happy to draft a few sentences which describes that first right to the corporation and amend the disclosure statement by interlineation.

THE COURT: Okay. Are there any other comments that you would like to address to either Mr. Brown's or—

MS. FLEISSIG: Well, I would just point out [9] one other fact, your Honor. The eight year period that Mr. Cardozo refers to in his letter pertains to a shareholder sale—shareholder agreement, to which only the other two shareholders are parties. And that is set forth as clearly on the face of the agreement as it possibly can be.

If your Honor has any doubt about these matters, I'd be happy to put Mr. Toibb on the stand and let him testify to them. But, the shareholder agreement which he says would require the agreement of other shareholders to transfer for a period of ten years just—Mr. Toibb's not party to it.

THE COURT: Umm hmm.

MS. FLEISSIG: It just has no application to them. Now, Mr.—Mr. Brown and Mr. Miller did indeed impose those obligations on themselves to keep each other in the corporation, and that's the express purpose of the agreement set out in that agreement.

From their further contact, we can—conduct, we can see that they specifically did not care to keep Mr. Toibb in the—in the—in the company. I would just—I have one major concern about this, your Honor.

[10] And that is not so much the objections to the disclosure statement because I think they're somewhat frivolous. But, rather, the fact that Mr. Brown has now taken it upon himself to send a letter to this Court offering to buy Mr. Toibbb's stock and obtain a personal release for himself and others from any personal liability that may—he may have.

I believe that this offer was also referenced in Mr. Cardozo's letter. I think that both of these documents are expressly in violation of Mr. Toibb's exclusive period. And I would request that the Court not make them a part of any file that is open to the purview of creditors until such time as Mr. Toibb's exclusive period has expired. I would also request that in—

THE COURT: Why shouldn't the creditors be privy to an offer which would pay them more than eleven percent?

MS. FLEISSIG: Because your Honor, I think that this is an area that is identical to the *Wisconsin Barge* case, where ACBL was trying to get in a higher offer as a higher bidder on the property. Mr. Toibb is given, by Code, an exclusive opportunity to try and reorganize with [11] his creditors.

THE COURT: Umm hmm.

MS. FLEISSIG: And this could be no different than informally sending out a plan—a competing plan to creditors in violation of the exclusive period. It was for that very reason that the plan of ACBL was not permitted to be put before the creditors of *Wisconsin Barge*.

The court says no—the Code says no one other than the debtor can submit a plan within the first 120 days. And there are sixty additional days to confirm that plan. We have filed this plan of reorganization within the statutory period and I think that the Code intended to permit us the exclusive right to attempt to reorganize with our debtors.

And I would point out one thing to your Honor. If you look at Mr. Brown's letter, Mr. Brown does not purport to say that the stock is worth Fifty Thousand Dollars ($50,000). Indeed, in his own language, he says he doesn't think it's worth anything. But he wants to pay Fifty Thousand Dollars ($50,000) to get rid of Mr. Toibb because he considers him a nuisance. And he

wants to pay Fifty Thousand Dollars ($50,000) in order [12] to obtain a personal release of liability.

And if your Honor will look at his offer, it is not just an offer to purchase the stock. He purports to obtain the stock and a release of all liability for himself, for Mr. Miller, for Mr. Cardozo, for what we believe are very egregious breaches of fiduciary duty and a blantant attempt at an improper squeeze out.

THE COURT: Well, you've hit the nail on the head. The question is, this debtor has one asset basically.

MS. FLEISSIG: That's correct, your Honor.

THE COURT: And the asset is four hundred shares of stock. The question is, should the creditors be aware of an offer to purchase that? And frankly, I think they should. Because I think that in any litigation analysis, which you do have in your disclosure statement, a comparison of what the creditors would receive in a Chapter 7 has to be at least disclosed to what the debtor is offering them. And—

MS. FLEISSIG: But your Honor, he is not purporting to state that that's the value of the stock.

THE COURT: Yes.

[13] MS. FLEISSIG: He is purporting to obtain—to buy for himself a release of personal liability.

THE COURT: I think a disclosure in the liquidation analysis section that an offer to purchase for Fifty Thousand Dollars ($50,000) has been made, provided that you—that the debtor releases all of the officers, employees, directors of the corporation. But, you have not stated in your disclosure statement that you have any such claims.

MS. FLEISSIG: Your Honor, doesn't that essentially put—force the debtor to submit competing plans of reorganization in his own plan of reorganization? Doesn't that defeat his ability to—it seems to me, your Honor, that all we have to do from now on in a Chapter 11 case that—

If I'm a creditor and I've got a competing claim, I'm sure going to put that baby on file right away and then say, 'hey, the debtor has to put my plan in front of the creditors. I know I can't do it, but let's let the debtor go and do it.'

I think that that exc—, —that defeats the [14] entire purpose behind the exclusive period that is accorded to the debtor. Either his creditors are going to find this an acceptable deal or they're not. And if they do not—

THE COURT: But they're not going to have the knowledge, they're going to say it's eleven cents or I don't know what else I get. But we know that lurking in the background without their knowledge is an offer of twice as much.

MS. FLEISSIG: That's correct, your Honor.

THE COURT: You're offering Twenty-Five Thousand (25,000) minus expense of administration claims.

MS. FLEISSIG: And that is certainly what happened in the *Wisconsin Barge* case as well. And that offer was not permitted to be put forth in front of the creditors, to preserve the debtor's exclusive period.

THE COURT: Umm hmm.

MS. FLEISSIG: And perhaps it is a little bit unfortunate. But there are no creditors here today. The creditors have not shown a substantial interest. And there are more interests at stake here—

THE COURT: Well, wait a minute. Wait a [15] minute. Mr. Brown's letter was received on March the 3rd. As you've indicated, it was sent to me with a copy to you. The creditors are without knowledge of this.

MS. FLEISSIG: As they should be, your Honor.

THE COURT: Okay. Well, that's why they're not here today.

MS. FLEISSIG: Except Mr. Brown's offer—Mr. Brown originally made the offer before the trustee to purchase the stock for Twenty-Five Thousand Dollars ($25,000), and that proposed sale was put before the

creditors by the trustee. So they have known that Mr. Brown is out there for some time. Your Honor—

THE COURT: Well, an offer—a new offer apparently has been made in a letter dated March the 2nd.

MS. FLEISSIG: That is correct, your Honor. And I would submit that requiring this debtor to put his—put that offer in front of the creditors himself will eviscerate the exclusive period that is provided to the debtor. And it is for that reason that I think it should not even be a part of the file.

[16] I think it was a violation of the exclusive period even for that gentleman to send that letter to this Court. That is my opinion. He is accorded an exclusive period, and what Mr. Brown has done is put forth his own plan of reorganization. We have a single asset case and—

THE COURT: Would you also deny his right, if Brown had not written to the Court but appeared today and said 'I wish to communicate to debtor—to the creditor community in the same packet of information that you set out,' do you think that should not be allowed to happen?

MS. FLEISSIG: I certainly would, your Honor, because that—it contains two violations. It not only violates the exclusive period, but it puts an offer before the creditors without a disclosure statement. And no offer is to be put before creditors without a disclosure statement. So, I think that just compounds the problem that we've got.

THE COURT: It seems to me we're perpetrating deceit on the creditor community by not telling them that they could—that more money is available to them—

[17] MS. FLEISSIG: But, your Honor—

THE COURT: —and I have to weigh that, that—I want to you to make a decision but I can't tell you what your choices are against a complete and full disclosure. Let me consider this.

MS. FLEISSIG: Your Honor, may I raise two other points?

THE COURT: Sure. Umm hmm.

MS. FLEISSIG: One is—well, I guess I only have one. I had two but one of them just left. If it comes back, I'll let you know.

THE COURT: All right.

MS. FLEISSIG: I would like to point out to the Court that—we have other grounds for opposing any proposed sale to these gentlemen—to Mr. Brown or to Mr. Miller; through Mr. Cardozo or otherwise.

THE COURT: But we're not—all we're doing is asking the creditors to vote this plan up or down.

MS. FLEISSIG: I understand, but—

THE COURT: And if they vote it down, that does not say that there's going to be a sale.

MS. FLEISSIG: Oh, I understand that, your Honor. But I would just point out while your [18] Honor is considering this matter, that even if this were a 363 sale, that the Court has power to comply a sale—to refuse a sale that doesn't comply with State and Federal law. And that's set forth in the matter of *Bourne Chemical*, 54 Br. 126.

And I'd also cite to the Court the case of *In re: Tabletalk, Inc.*, 53 Br. 932, 942, which recognized the necessity of the Court to maintain the integrity of it's own judicial process. We think that what Mr. Brown is attempting to do here is finally cap the squeeze out that's been—they have been attempting for several years.

Mr. Toibb is here; he could get up on the stand and testify for days. He could get up on the stand and testify for hours about the conduct that has been going on here. Basically they have been attempting to hold Mr. Toibb hostage; they fired him from his job; they took away any income from the corporation; he was the founder of the corporation. It was his idea; he brought these two gentlemen in—

THE COURT: Well, if you think you have a claim I would assume that claim would be discussed in the disclosure statement. If you have a claim [19] where if you

intend to sue these folks, if you think you have a monetary claim, or if you think that you're not going to do that, disclose it and then sue them and make a huge recovery, perhaps that's your game plan.

MS. FLEISSIG: Your Honor, I would like to request—

THE COURT: What is your game plan? Are you going to sue IEC, or this company?

MS. FLEISSIG: Well, your Honor, I'm not going to do anything. Mr. Toibb may well sue his other shareholders.

THE COURT: I guarantee he's not going to sue them unless he discloses it here.

MS. FLEISSIG: Well—

THE COURT: Or if he does sue them that the benefit of that suit is going to go right to those creditors, 'cause this Court's not going to be—this Court would consider that a fraud.

MS. FLEISSIG: Your Honor, I would like to make several requests to this Court to amend the disclosure statement—

THE COURT: Sure.

MS. FLEISSIG: —by interlineation. One is found at the top of page 11, and is merely a [20] typographical error correcting the sentence that begins on page 10. It says: "In addition, for a period of six years beginning on the effective—

THE COURT: Yeah.

MS. FLEISSIG: —date, debtor will pay Class 1 creditors . . .". It should say: ". . . up to the principal amount of their claims."

THE COURT: Yeah. I picked that one up. Go ahead.

MS. FLEISSIG: The—and to make that more clear, delete the line that says: ". . . will pay to Class 1 creditors on a pro rata basis fifty percent (50%) . . .", so that it will just read: ". . . up to the principal amount of the claim, fifty percent (50%) of all amounts received as dividends, and of any proceeds received upon the sale of the stock."

THE COURT: All right.

MS. FLEISSIG: We would also like to add a sentence at the end of that paragraph which says that: "Debtor also agrees to pay Class 1 creditors pro rata until the principal amount of the claims has been paid in full one hundred percent (100%) of any amounts he may receive as a judgment in settlement of any claim—as a [21] judgment or in settlement of any claim debtor may file against the two remaining shareholders of IEC and others based upon allegations of an improper attempt to squeeze out and for breach of fiduciary duty in connection with their activities after the formation of IEC. And reference, see description of litigation; and very briefly describe in that section that he has a potential claim. We do not know what it's value is.

THE COURT: And you're going to turn over the entire proceeds of any recovery?

MS. FLEISSIG: Up to—until these creditors have had their principal amounts paid in full. To the extent that there is more, I believe it should—

THE COURT: Umm hmm.

MS. FLEISSIG: —belong to Mr. Toibb.

THE COURT: Sure.

MS. FLEISSIG: But—

THE COURT: Is there any incentive for him, then, to prosecute his lawsuit?

MS. FLEISSIG: Certainly, your Honor, because if—if he does recover, there is much, much more at stake here than the amount that is owed to these creditors. And this was Mr. Toibb's [22] life for eight years. This has not been a pleasant experience for him, and not one that he is happy with.

I do not believe that Mr. Toibb—from having worked with him these few months, I do not believe that Mr. Toibb is ready to let this matter go.

THE COURT: Certainly a disclosure of that nature is called for.

MS. FLEISSIG: Your Honor, one other amendment by interlineation; it is not terribly likely. But, in the

event that Mr. Toibb is able to work something out with his creditors—right now, we have language in there saying that he will not encumber the stock or dispose of it except to a bona fide purchaser at an arm's length transaction.

We would like to make plain that if the corporation can go forward on a go forward basis that he may well need to encumber the stock in order to get financing for the corporation.

THE COURT: You can make the disclosure. Let me have a red line copy as well as a clean copy of any changes.

MS. FLEISSIG: Certainly, your Honor.

[23] THE COURT: Page 2, would you change the address so that ballots are sent to you—your office, to your attention?

MS. FLEISSIG: I certainly will, your Honor.

THE COURT: On pages 10 and 11, you've made the change that there was a typo. However, on page 11—on page 10, in the last paragraph, paragraph entitled "C", page 10.

MS. FLEISSIG: Umm hmm.

THE COURT: You tell me that the creditors are listed on the debtor's schedules at One Hundred and Thirty-Seven Thousand Dollars ($137,000).

MS. FLEISSIG: Yes.

THE COURT: Add a sentence and tell me what the claims are. You've listed One hundred and Thirty Seven (137); the claims filed may be higher or lower.

MS. FLEISSIG: I certainly will; I think that—

THE COURT: I just want the—you know.

MS. FLEISSIG: —at most, it's a few hundred dollars. All claims have been filed already. But I will correct that to the actual amount.

[24] THE COURT: You know what I'm saying; if—if there's any large difference, let the creditor—

MS. FLEISSIG: I certainly will.

THE COURT: —community know about it.

MS. FLEISSIG: We have those dollar amounts.

THE COURT: I thought you were very clever on page 11.

MS. FLEISSIG: Let me see where.

THE COURT: Well, I'll tell you where. Under the provision entitled "Additional Provisions for Treatment of Impaired Classes"; the additional treatment for the impaired classes is that they're going to by either accepting the plan or voting for it or any number of different activities, they are deemed to waive, relinquish and release all of their rights and claims against the debtor. This is under the caption of additional provisions? Why don't you also call it—

MS. FLEISSIG: And release?

THE COURT: —discharge or whatever?

MS. FLEISSIG: And discharge; certainly, your Honor.

THE COURT: Discharge the debtor; whatever.

[25] MS. FLEISSIG: Would you like me to put in further that we are only talking about rights and claims that we have—they have against the debtor, I—

THE COURT: Pre-petition.

MS. FLEISSIG: Pre-petition.

THE COURT: Any claims arising pre-petition.

MS. FLEISSIG: I did not mean to be clever. I don't even think—

THE COURT: That's all right.

MS. FLEISSIG: —I started that as my own language.

THE COURT: Is there a transition problem between pages 13 and 14?

MS. FLEISSIG: Yeah. It looks like a sentence was dropped, your Honor.

THE COURT: Okay. Lastly—I know I'm making you make a lot of changes.

MS. FLEISSIG: That's all right. We have a word processor.

THE COURT: Apparently. You've disclosed the lawsuit that may be filed, or at least the claims held by Mr. Toibb as additional assets.

MS. FLEISSIG: That's right.

[26] THE COURT: Also, I'd like for you to disclose two things that are disclosed in every disclosure statement of mine. List all claims to which objections will be filed. And secondly, all intended actions to be brought under any avoiding powers of the Code, preference 548 whatever.

MS. FLEISSIG: Umm hmm.

THE COURT: So that nobody is surprised.

MS. FLEISSIG: Will do, your Honor.

THE COURT: Now, the last thing I need to do is get you a little order with respect to whether the Brown offer or the offer contained in the Brown letter is to be disclosed. And let me consider what you have said, which is basically that you think it's an invasion of the exclusive period and the standing provision and the case citations you've given me.

MS. FLEISSIG: And also point out to your Honor that what they are attempting to do is a squeeze-out of Mr. Toibb. And if they're—I believe that they are attempting to use the facilities of this Court to effect that. And I would hand your Honor one other case from the First Circuit, 1986, that defines exactly what's gone on here. And I think it would be an improper [27] use of the Court processes to permit them to try and do this within the Bankruptcy Court.

THE COURT: Let me read these cases then.

MS. FLEISSIG: Certainly; thank you, your Honor.

THE COURT: Thank you.

MS. FLEISSIG: I would—

THE COURT: We're just going to have to leave in limbo your disclosure statement until I can get you an order.

MS. FLEISSIG: Your Honor, to the extent that the balloting process would take more than sixty days, we—

THE COURT: Sure.

MS. FLEISSIG: —would request an extension.

THE COURT: Of course.

MS. FLEISSIG: I would also point out, your Honor, we did notice up for hearing this morning the fee requests of Mr. Radloff and Mr. Lang when they were trustee and attorney for trustee in this matter.

THE COURT: That's certainly—

MS. FLEISSIG: And we've received no objections to them. We have no objections to [28] those fee requests. I believe Mr. Radloff is still here.

THE COURT: Mr. Radloff, would you like to step up? It was the trustee's fee application for what? Sixteen Hundred and Ninety-Six Dollars ($1,696); is that correct?

MR. RADLOFF: I think that was the attorney's fees application, your Honor.

THE COURT: Pardon me; you're right. All right. The debtor has no objection to a Five Hundred Dollar ($500) allowed claim for trustee's fee?

MS. FLEISSIG: I'm sorry, your Honor?

THE COURT: No objection to the Five Hundred Dollar ($500) request?

MS. FLEISSIG: No objection from us or any creditors.

THE COURT: All right. We'll allow these to be paid pursuant to the terms of the plan.

MR. RADLOFF: That's fine, your Honor.

THE COURT: Thank you.

MR. RADLOFF: Thank you.

THE COURT: Thank you, Ms. Fleissig. Anything further?

MS. FLEISSIG: Your Honor, I just would [29] point out that Mr. Toibb is here if you feel any testimony from him would be helpful. I'm sure he'd love to talk to you about this.

THE COURT: I think you have done a capable job this morning.

MS. FLEISSIG: Thank you.

THE COURT: Thank you.

AFFIDAVIT

STATE OF MISSOURI)
) ss
COUNTY OF ST. LOUIS)

I, SHELDON BARUCH TOIBB, Debtor in the above cause, having been duly sworn upon my oath, hereby acknowledge that, to the best of my knowledge, information and belief, the audiotape record provided to Mary Y. Hardy, is an exact duplicate of the audiotape record of all of the proceedings conducted before the Honorable Barry S. Schermer on March 7, 1988, in the above styled bankruptcy, which was procured by me from the Clerk of the Bankruptcy Court, Eastern District of Missouri, Eastern Division.

/s/ Sheldon B. Toibb
SHELDON B. TOIBB

SUBSCRIBED AND SWORN to before me this 14th day of October, 1988.

/s/ Mary Y. Hardy
Notary Public

[Certification Omitted in Printing]

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Case No. 86-02881-BSS

IN RE SHELDON BARUCH TOIBB,
Debtor

At Saint Louis, in this District, this 8th day of March, 1988.

ORDER

Upon Motion of the Court, it is

ORDERED that Debtor show cause, before the undersigned in United States Bankruptcy Court Room No. 3, 7th Floor, U. S. Court House, 1114 Market Street, St. Louis, Missouri, 63101, on March 30, 1988, why this Chapter 11 case should not be dismissed, for Debtor's failure to qualify as a Chapter 11 Debtor.

/s/ Barry S. Schermer
BARRY S. SCHERMER
United States Bankruptcy Judge

Copy mailed to:

Sheldon Baruch Toibb
Debtor
8640 Olive Blvd.—Apt. A
St. Louis, MO 63132

Audrey G. Fleissig
Attorney for Debtor
720 Olive St.—24th Floor
St. Louis, MO 63101

Stuart J. Radloff
Attorney at Law
7777 Bonhomme—Suite 1400
Clayton, MO 63105

and

All creditors and other parties in interest

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Case No. 86-02881-BSS

IN RE: SHELDON BARUCH TOIBB,
Debtor.

TRANSCRIPT ON APPEAL

March 28, 1988

APPEARANCES

Peper, Martin, Jensen, Maichel & Hetlage, 720 Olive Street, 24th Floor, St. Louis, Missouri 63101, by Audrey Fleissig, Esq., appearing on behalf of debtor.

[2] INDEX

[3] The following cause came on for hearing before the Honorable Barry S. Schermer, Judge of the United States Bankruptcy Court, Eastern District of Missouri, Eastern Division, at St. Louis, on the 28th day of March, 1988.

The Debtor, Sheldon Baruch Toibb, was present in person and by attorney Audrey Fleissig.

[4] PROCEEDINGS

THE COURT: We'll go ahead and take up the matter of Mr. Tobb.

MS. FLEISSIG: Mr. Toibb, sir.

THE COURT: Toibb, I'm sorry.

MS. FLEISSIG: Thank you.

THE COURT: Miss Fleissig appears today on behalf of Mr. Toibb, in response to the Court's order to show cause. And let me explain why this was set. I had heard earlier in the month, I believe, an application for approval of the disclosure statement. And the more I reviewed the disclosure statement, it dawned on me; why are we in a Chapter 11 position here?

So, I deferred consideration of the—without impeding —

MS. FLEISSIG: Umm hmm.

THE COURT: —the debtor's ability or time constraints which we'll get to in awhile; that will not be impaired. But while I'm—but while we're considering this other matter—

So, tell me why on the date of filing your client was eligible for relief, and why I did not err—which I think I may have—in granting this conversion?

[5] MS. FLEISSIG: Well, your Honor, I am—as I assume your Honor is referring to—aware of the *Wamsganz* case.

THE COURT: Certainly.

MS. FLEISSIG: But that is not a case which I think in any manner controls this situation. This is a most unusual bankruptcy proceeding; it's got a lot of unusual facts. And the only party that seems to be raising any dispute in this matter is a party that's not a party to this bankruptcy and not a party in interest.

THE COURT: Are you talking about the Court?

MS. FLEISSIG: No, no, your Honor. I'm talking about Sidney Brown.

THE COURT: All right.

MS. FLEISSIG: The—well, that's an interesting question. Since 1981, your Honor, Mr. Toibb has worked as nothing other than an independent contractor. He started a business in 1983 with Mr. Brown and Mr.—with Mr. G. William Miller. It was his idea, his business; he was retained in that business as a consultant. We have Mr. Toibb here, your Honor; we have a copy of that consulting agreement.

He was no one's employee; he has not since [6] 19—, —since the early 1980's ever been anyone's employee. He has at all times functioned as an independent contractor. Mr. Toibb believed he had created for himself and assured himself a future as a consultant in the alternative energy field. He still remains a shareholder of Independence Electric Corporation.

However, in 1983, the other two shareholders in the corporation terminated—we believe wrongfully—his consulting contract, and have been attempting to get his stock ever since.

THE COURT: Now, when—when did he start the business; in '81?

MS. FLEISSIG: Yes, your Honor.

THE COURT: The con—

MS. FLEISSIG: Excuse me, in 1983. The termination was in 1985. I'm giving you two wrong—two wrong time periods.

THE COURT: So, the consulting agreement was dated in 1983?

MS. FLEISSIG: That is correct, your Honor.

THE COURT: In 1985, wrongfully or otherwise—

MS. FLEISSIG: Right.

THE COURT: —that consulting agreement was [7] terminated.

MS. FLEISSIG: By—by the other two shareholders. However your Honor, Mr. Toibb remained there. In fact, Mr. Toibb even after this bankruptcy was filed was still requested to do work for Independence Electric Corporation. For over a period of over a year, the discussions were going on back and forth, back and forth, what were they going to attempt to exact from Mr. Toibb for either his stock or for him to continue in a consulting arrangement with IEC.

And Mr. Toibb had to retain counsel and incur considerable expenses during that time period. Now, there are several things to keep in mind, all of which Mr. Toibb can testify to. Many of his debts that are reflected on his schedule were debts that he ran up during this time period, many of which were business related.

THE COURT: Well, what was—focus for me, if you will, on October 2nd, 1987.

MS. FLEISSIG: Right.

THE COURT: What was—he was an employee then, was he not?

MS. FLEISSIG: No. No, your Honor, he was not an employee—

[8] THE COURT: I see.

MS. FLEISSIG: —and he is not an employee now.

THE COURT: What is his—during the year 1987, what did Mr. Toibb do to earn a living?

MS. FLEISSIG: Mr. Toibb is employed as an independent contractor as a private fund raiser. He—originally when this motion—he, he—that began in May of 1987, your Honor, while the 7 was pending. But before this was converted to a Chapter 11.

He has since acquired a second charity for which he is a private fund raiser. We—he works out of his home or out of those offices. Some of his expenses are reimbursed and some are not. For instance, he pays for his own

gasoline; he pays for his own telephone; his own car expenses. Some of his direct expenses are reimubursed, some are not.

Mr. Toibb has earned money—

THE COURT: Would it be better—

MS. FLEISSIG: —during this—

THE COURT: —if he testified, or would you prefer he did not take the stand?

MS. FLEISSIG: Oh, no. I am more than happy [9] to have him testify, but what I would like in, in completing this discussion of why I believe a Chapter 7—a Chapter 11 is appropriate; I think it is appropriate solely on the basis of the fact that he is an independent contractor working for these charities. Absent protection of this bankruptcy court, every dollar he earns is going to be attached by his creditors.

Secondly, this pro—, —this bankruptcy process itself is integral to Mr. Toibb at this point attempting to continue what we believe is his right as a consultant with Independent Electric—Electric Corporation. And there is considerable promise for financial reward, not just for Mr. Toibb, but for his creditors.

And, as your Honor may recall from the disclosure hearing, we are more than willing to amend our disclosure statement to give to Mr. Toibb's creditors every penny he gets. Nobody's trying to keep anything from his creditors here.

THE COURT: I don't want you to imply by my show cause that I am desirous or coercing your client to give more to his creditors than he desires to in his plan. That's not my intent.

MS. FLEISSIG: Okay.

[10] THE COURT: But rather to see if I had erred—

MS. FLEISSIG: Certainly.

THE COURT: —back in October in converting this case.

MS. FLEISSIG: Would you like to put Mr. Toibb on the stand now?

THE COURT: Yes—yes, ma'am.

(To the Witness) Mr. Toibb, would you raise your right hand please? Do you solemnly swear the testimony you're about to give in this matter shall be the truth, the whole truth and nothing but the truth, so help you God?

THE WITNESS: I do.

THE COURT: If you would be seated over here, sir?

MS. FLEISSIG: Your Honor, if you'll just give me a moment to mark some exhibits?

THE COURT: Certainly.

[11] SHELDON BARUCH TOIBB,

called as a witness herein, having been first duly sworn upon his oath, was examined and testified as follows, upon,

DIRECT EXAMINATION

BY: MS. FLEISSIG:

Q Mr. Toibb, would you tell me what your educational background is?

A I have a Bachelor's degree in political science; a Juris Doctor degree and a Master of Laws degree.

Q Mr. Toibb, in the 1990's, you were engaging yourself in the energy field; is that correct?

A Yes, I was involving myself in the energy field.

Q What was the first experience that you obtained in the energy field?

A That was in the year 1979 to 1980; I was working on—as a consultant to a small law firm, Brand & Hall in Washington, D.C., in which I acted as a discovery assistant on an anti-trust case in the electrical energy industry.

Q Okay. What was your next employment in the energy field? Or, your next endeavor in the energy field?

[12] A I served as a staff attorney in the office of general counsel at the Federal Energy Regulatory Commission in Washington, D.C. for a year and a half.

Q And what period of time what that?

A That is from March of 1980 until September of 1981.

Q And, very briefly sir, what did you do there?

A I worked with natural gas pricing regulations and also licensing of hydroelectric power projects.

Q Okay. And you said you did that until September of '81?

A Yes.

Q And I take it then you left the Federal Energy Regulatory—

A Yes.

Q Commission? And what did you do when you left there?

A I wrote a business plan and attempted to raise venture capital to create an alternative energy development company in the hydroelectric power field.

Q I'm going to hand you what I've marked as Exhibit Number 1.

A Yes. This is my business plan that I [13] created during the year 1981 and 1982. It is called The Strategy For The Creation Of An Independent Hydroelectric Generation Company In The South. This was the business plan which I sold to Electric Corporation for which I exchanged—for which I received my stock and consideration.

MS. FLEISSIG: I'm sorry, your Honor. I proceeded to pre-mark these exhibits. Would you like your clerk to mark them?

THE COURT: No, that's fine. All right.

Q Mr. Toibb, during what period of time were you putting this business plan together?

A From September of 1981 until March of '83, when Independence Electric Corporation was founded.

Q And where were you officed during this time period?

A I was officed in two different locations; from—for most of the time, close to a year, I was housed in the

office of the law firm of Chapman, Duff and Paul in Washington, D.C. After which at that time I operated out of my house where I was living—my residence.

Q And was Chapman, Duff and Paul assisting you in putting together your business plan?

A Yes. Chapman, Duff and Paul helped me put [14] together the business plan and—under the expectation they'd be regulatory counsel for the firm if venture capital was raised and a company was formed.

Q And were you working with any other consultants during this period?

A Yes, I was working with Stone & Webster Engineering Corporation and Stone & Webster Management Consultants out of Denver, Colorado, who helped—

Q Okay. And—

A —who put together some of the computer runs and numerical and financial formulations for my business plan with me.

Q And you were located in Washington, D.C. during that time?

A Yes. I might also add I was also working with a professional accountant from the accounting firm Ernst & Whinney in Washington, D.C. during this time period, to help me put together the business plan.

Q I hand you what's been marked as Exhibit 2.

A Yes.

Q Can you identify that document?

A Yes, this is an abbreviated version of my business plan which was presented earlier. This was presented to Mr. Sidney Brown and Mr. G. William Miller from which they decided to invest money in the—in al [15]—in my business plan and Independence Electric Corporation.

THE COURT: Thank you.

Q And Exhibits Number 1 and Exhibits Number 2 are documents that you drafted?

A Yes.

Q Now, we're up to a time—

A Entirely by myself.

Q You—excuse me?

A Entirely by myself.

Q We're up to a time period of March, 1983.

A Yes.

Q In putting together and beginning this business, did you incur debts?

A Yes, I did.

Q Okay. By March of '83, was there any given amount by which you were in debt?

A Yes. I was roughly approximately fifteen to twenty thousand dollars in debt at that time period, which I had run up on personal expenses for travel expenses in going to Stone & Webster in Denver and going to potential venture capitalists.

And in incurring photographic expense, postage expense, typing expense, other types of expenses in formulating my business plan, plus [16] automobile expenses, related and involved.

Q Now, wait. Exhibit Number 2 you identified as a document that you gave to Mr. Miller and Mr. Brown pursuant to which they invested money in your plan; is that correct?

A Yes, that—they—I did not give that document to them directly, but it was given to them on my behalf to invest money in my plan.

Q Okay. And was a corporation formed as a result of those efforts?

A Yes, it was. Independence Electric Corporation was formed in November of 19—, —I'm sorry. In March of 1983.

Q And were you a shareholder?

A I am a shareholder of Independence Electric Corporation.

Q Are there other shareholders in Independence Electric?

A Yes, there are two other shareholders; Mr. G. William Miller and Mr. Sidney J. Brown.

Q And what percentage of the shares do you hold?

A I own twenty-four percent of the stock in the company. Four hundred shares out of an outstanding sixteen sixty-seven (1,667).

[17] Q And the other two gentlemen together control the remainder of the shares?

A Yes, the other two remaining gentlemen control seventy-six percent of the shares of the company.

Q Okay. I hand you what I've marked as Exhibit Number 3.

A Yes.

Q Can you identify that document?

A This is the consulting agreement dated March 22nd, 1983 from Independence Electric Corporation, signed by Mr. G. William Miller, President and myself; which is my consulting agreement with the company at which I would be paid an annual rate of fifty thousand dollars a year, plus to be reimbursed various expenses which I would be paying out of my pocket as an independent contractor with the Independence Electric Corporation.

Q Were you ever employed as an employee of Independence Electric Corporation?

A I was never employed as an employee of Independence Electric Corporation.

Q And how long did you anticipate your consultancy with Independence Electric Corporation would continue?

[18] A I expected it to continue infinite dura—, — of indefinite duration, and hopefully infinite duration, 'cause I would have an on-going term with the company which I founded.

Q Now, you said in March of 1983 you had incurred debts in getting this business started of about fifteen thousand dollars; is that correct?

A Yes. That is correct.

Q What happened to those debts?

A Mr. Sidney Brown gave me a personal loan for fifteen thousand dollars which I used to pay off those

debts, which loan was subsequently assigned to the company.

Q And—

A As return of part of his capital contribution.

Q And did you pay off those debts through your consulting agreement?

A Yes, I paid them off at a rate—I paid off that note to the company in terms of five hundred dollars a month, which was withheld from my consulting fees. And—and the balance was paid off in June of 1985.

Q Now, during what time period were you employed as a consultant—was IEC continuing it's [19] contract with you as a consultant and were you indeed receiving payments?

A I received payments as a consultant from Independence Electric Corporation, except for those time periods that payments were unlawfully withheld from me under my consulting agreement, which subsequently were made up at a later date.

Q During what time period?

A From March—

Q March—

A March of '83 until the end of April, 1985.

Q Okay. And what services were you performing for Independence Electric Corporation during that time period?

A I would target potential hydroelectric sites to pursue for licensing; for possible development and construction. I, I, I researched economic marketing of electricity for projects to be pursued by Independence Electric Corporation, such as what electric utilities would be potential purchasers in the projects.

I undertook a lot of drafting of formulation of legal pleadings before the Federal Energy Regulatory Commission for licensing of projects. I helped undertake drafting a potential prospectuses for private placements to raise addition funding for the company.

[20] Q Mr. Toibb, we've cut you off in the interest of time, because—

A Okay.

Q —this isn't terribly—

A Okay.

Q Everything—

A I'm just trying to respond to your questions.

Q —that you did is not necessarily relevant to the particular issue before this Court. Are there other activities that you performed on behalf of IEC, as well as—

A Many others, which I could elaborate in more detail if the Court wanted it.

Q Okay. And where were you working during that time period; where were you officed?

A From the period of March of 1983 until late—until January 1984, I was officed—housed in—my office was in the offices of G. William Miller and Company, a merchant banking firm in Washington, D.C. From the period of January '84 until the end of April, 1985 and even thereafter after my consulting agreement, I worked out of my house—my apartment in Washington, D.C.

Q And you were performing all of the same [21] functions for Independence Electric Corporation?

A Same functions; identical. Nothing changed whether I worked in the merchant banking offices of Miller or in my own personal apartment.

Q And who paid for your rent during this time period?

A I paid for my own rent.

Q And who paid for your phone bill during this time period?

A I paid for my phone bill, except for part of it was reim—, —part of the long distance was reimbursed by G. William Miller—by Independence Electric Corporation.

Q And any—did you obtain business furniture for Independence Electric Corporation?

A Yes, and that business furniture was paid for out of my own pocket.

Q Okay.

A Such as file cabinets, bookcases for books which were purchased by Independence Electric Corporation. And I also incurred things like gasoline, postage, photocopying expenses, other types of normal office expenses and—

THE COURT: What's the point of this; to show me he wasn't an employee?

[22] MS. FLEISSIG: No, your Honor. He incurred many expenses during this time period which were not reimbursed by Independence Electric Corporation. Part of the expenses that he incurs directly during this time period and that he incurs immediately after this time period were related to his work with Independence Electric Corporation and were not reimbursed. And some of these are, indeed, the debts that he has in this bankruptcy proceeding right now.

THE COURT: Okay. Do you think the nature or category of his indebtedness bears on the issue of whether he's qualified to be a Chapter 11 debtor?

MS. FLEISSIG: Your Honor, I don't think that the case law, so far as I have read it, is terribly clear. And since *Wamsganz*, I am not aware of cases that have interpreted. I know that although the Sixth Circuit has ruled similar to *Wamsganz*, some cases that have come down within that circuit subsequent to the Sixth Circuit's ruling have also looked to issues such as were these business debts or were they not business debts.

All—Mr. Toibb is here, and—

[23] THE COURT: Sure.

MS. FLEISSIG: —can testify for your Honor that many of the debts that he has now are not personal debts, not consumer debts, but rather are indeed business debts. And it is our hope in this bankruptcy proceeding not merely to reorganize Mr. Toibb's business as a private fund raiser, but also to permit him the opportunity and the chance to reorganize in connection with his relationship to IEC.

THE COURT: All right. Thank you.

MS. FLEISSIG: And if your Honor—if your Honor wants to accept merely my statement to that effect rather than testimony, we can move on.

THE COURT: Well, your statement plus the schedules would reflect that they were—these debts were incurred during that time period.

Q Mr. Toibb, your consulting agreement was terminated in April of 1985; is that correct?

A That is correct.

Q And in April of 1985, were you once again in debt?

A Yes, I was in debt in April of 1985. I had accumulated roughly twenty to twenty-five dollars in debt, partially accumulated to—in the fact that a [24] lot of my office and personal and travel expenses run up on behalf of Independence Electric Corporation were not reimbursed.

Q Okay.

A Properly.

Q And how was your consulting agreement terminated, sir?

A My consulting agreement was terminated by letter, and I was—I believe it was terminated unlawfully.

Q Was it terminated orally at some time period before it was terminated by letter?

A What happened was, quite frankly, was in the beginning of March, 1985 Mr. Sidney Brown proposed an ultimatum to me. He told me I should give four percent of my stock to an employee of Mr. Miller's named Mr. Michael Cardozo. I refused and therefore my—

THE COURT: Now, the question was: was your agreement terminated verbally before you received the letter? I really don't want to hear a history of who hit whom when, but—

THE WITNESS: Okay.

THE COURT: —rather the question, I think, was as I've stated. Did somebody verbally terminate the agreement before you received a [25] writing terminating the agreement?

THE WITNESS: Yes, I received verbal termination of the agreement, although the terms of the agreement called for legal termination only to be in writing.

Q And was your check withheld during some period prior to the time that the termination was effected in writing?

A Yes, my verbal termination was—of funds was withheld from March and April of '85. Even though that—

Q Thank you Mr. Toibb. Your affirmative answer of yes really will suffice.

A Okay.

Q Now, Mr. Toibb, would you tell me what occurred during the time period from April of '85 through July of 1986?

A Several things happened. First of all—

Q Tell me what happened in connection with your relationship with IEC.

A Various offers and proposals went back and forth which would allow me to keep my stock in IEC and I have a potential consulting agreement to have the company go forward on its license applications and to undertake a private placement memorandum.

[26] I ran up various legal fees and other types of expenses during this time period, trying to protect my right to be a consultant with IEC and to protect my stock interest in the company.

Q Did you retain Mr.—the law firm of Dickstein, Shapiro?

A Yes, I retained Mr. Arthur Galligan at the law firm of Dickstein, Shapiro in Washington, D.C., which I ran up legal expenses close to ten thousand dollars in trying to negotiate a protected consulting agreement with IEC.

Q Mr. Toibb, did you pay a retainer to Mr. Galligan?

A Yes, I did; six thousand dollars.

Q And from where did you obtain those funds?

A I obtained those funds by a line of credit on one of my personal credit cards.

Q And that is at—still one of the debts that exists in this—

A Yes, it is.

Q —bankruptcy proceeding except there is interest running on it; is there not?

A Correct.

Q Or, interest ran during the time period—

A Correct.

[27] Q —that you incurred it—

A Correct.

Q —until you filed for bankruptcy?

A Correct. Plus a few hundred more than the six thousand.

Q Your schedules also show twenty-six hundred dollars to Dickstein, Shapiro. Is that part of the same indebtedness?

A Yes, that's part of the same representation; yes.

Q Did you hire any other attorneys during this time period?

A Yes, I had Jerry Tockman, a lawyer in St. Louis—Tockman, Mocerf & Wolk here in St. Louis. In which I ran up expenses not on a legal fee matter, but I ran up expenses like long distance telephone, postage, Federal Express; expenses like these in communicating with Mr. Tockman as far as my—vis a vis my relationship with my partners.

Q And while all of these discussions with your partners were ongoing, were you receiving any payments from them relative to your consultancy?

A None.

Q Now, your schedules reflect sir, an MCI bill in the amount fifteen hundred and twenty-four dollars [28] for—

A Yes.

Q —for long distance telephone charges.

A Yes.

Q You also have a C&P telephone for thirteen hundred and three dollars and forty-two cents—

A Yes.

Q —for 1986.

A Yes.

Q Were those charges related to your efforts to retain your interest in IEC?

A Absolutely. That had to do with talking with both Mr. Tockman and Mr. Galligan long distance. I might also add that I kept ongoing relationships with Stone & Webster Engineering Corporation in Boston, Massachusetts and Stone & Webster Management Consultants in New York; ongoing telephone conversations for which I was not reimbursed, trying to—trying to track the progress of Independence Electric Corporation.

Q Sir, did you also have discussions with an attorney in Philadelphia regarding a potential cause of action?

A Yes, Mr. Harold Kohn in Philadelphia, Pennsylvania.

[29] Q And are you continuing to discuss this matter with Mr. Harold Kohn—

A Yes, I'm discussing this matter with Mr. Harold Kohn as far as potential representation in a potential lawsuit by myself.

Q Based on a minority squeeze out?

A Based on a minority squeeze out and other—many other causes of action.

Q Okay. Mr. Toibb, during this time period from April of '85 to July of 1986, were you also looking for other engagements in the alternative energy field?

A Yes, I was looking for—to, to obtain consultancies for an alternative income in—with four or five other types of areas. Number one, alternative energy development companies like Independence Corporation, in California and other places in the United States. Number two, investment banking firms in St. Louis and New York.

Number three, utility consulting departments of Big Eight accounting firms. Number four, the legal staffs of various electric utilities. And number five, economic consulting firms both in Chicago and St. Louis which deal with management consulting in the electric utility economic field.

[30] And are you continuing to this day to not only obtain a—reobtain your position with IEC but also obtain other consultancies in the—

A Yes, I'm still continuing to look—

Q —energy field?

A —for other potential consultancies in the alternative energy and electric power fields. And I am also looking to reestablish a consultancy agreement with Independence Electric Corporation, which my stock, quite frankly, is essential for me to estab—, — reestablish a relationship with.

Q Have you—

(tape runs out at this point)

A —my interest because of their various threats to quit and let the company die during the last few years.

Q And would you anticipate that you would have a future with the company if a deal of that sort could be structured?

A If I found a potential buyer for their interests for which it was a mutually agreeable sale and I found such a white knight, I would have expected I would have a continued consultancy with Electric—Independence Electric Corporation in conjunction with my continued twenty-four percent stock ownership.

[31] Q Okay. Mr. Toibb, during this time period when you have been looking for other employment as a consultant in this same energy—alternative energy related field, have you run up other expenses related directly to those?

A Yes.

Q To that endeavor?

A Yes. A long distance—

Q Can you approximate that—well, are those expenses—are some of those expenses reflected on your schedules?

A Absolutely.

Q Okay. Did you—by July of 1986, had you worked out anything with the Independence Electric Corporation shareholders?

A No. No—no agreement had been made in, in, in—what date are you talking now?

Q July of 1986.

A No agreement had been reached in 1986, and I thought the company was dead, as Mr. Miller had gave—had handed in a letter—a resignation along with Mr. Cardozo as treasurer. And they had both quit as the company—I thought the company was dead.

Q Okay. So you thought the company was dead in the summer of 1986. And what—

[32] A I'm sure Mr. Brown also told me something—

A Mr. Toibb, please.

A Okay.

Q Let me take a little bit more—

A Okay.

Q —command of this proceeding.

A Okay.

Q In the summer of 1986, you thought the company was dead?

A I thought it was dead, yes, in late summer of '86.

Q Based upon representations that had been made to you by the remaining shareholders in the corporation?

A Correct; by both of them.

Q And what did you do?

A I moved back to St. Louis, Missouri thinking I had a dead company on my hands.

Q And what did you do thereafter?

A I filed for Chapter 7 bankruptcy—

Q Bankruptcy.

A —because I thought the stock was totally worthless and the company was dead.

Q And that was in November of 1986?

A Sure, it was.

[33] Did—have you since found out that Independence Electric Corporation is not dead?

A Sure, in January of 1987, I found out that they'd run the company behind my back and lied to me.

Q Did they ask you, in January of 1987, to do anything on behalf of IEC?

A Yes, they asked me to go to Boston, Massachusetts and visit Stone & Webster Electric—and manag—, —Engineering Corporation with representatives of Combustion Engineering Corporation to see if Combustion Engineering wanted to invest money in Independence Electric Corporation, potentially.

And I was quite surprised to hear this.

Q And does Independence Electric Corporation hold licenses to develop hydroelectric power sites?

A Yes, hyd—, —Independence Electric Corporation presently holds four licenses; one issued in August of 1987 and three in December of '87, for four hydroelectric power plants.

Q And as far as you know today, the company is not dead, but very much alive?

A The company is very much alive today.

Q And you did not know that when you filed for Chapter 7—

A I did not know that at all.

[34] Q —did you sir? Do you—

A In fact, I was wrongfully deceived on that point.

Q Do you still believe that there is the potential for you to work something out with the majority shareholders of IEC?

A Absolutely. If this company is to go forward, I was—and I was to maintain a twenty-four percent share, I believe there is plenty of potential for all of us to have a thriving business and for me—and for me to go back and be a consultant to the company once again.

Q Do you believe that that potential exists if you do not hold your shares in IEC?

A No. No. Holding my shares is essential to that point.

Q If you do not work anything out with the creditors —with the remaining shareholders of IEC, do you believe you have a cause of action against the remaining—the majority shareholders?

A I believe a very strong cause of action against them.

Q And you do hold a law degree do you not, sir?

A Yes, two of them.

[35] Q And would you be willing, as part of your plan of reorganization in a Chapter 11 proceeding, to share the proceeds from any such lawsuit with your creditors?

A Absolutely. I'm not trying—okay.

Q Absolutely is sufficient Mr. Toibb. And to the extent any purchase of your shares is affected as part of some work out, are you willing and proposing to share those proceeds with your creditors?

A Absolutely. And the same thing with any potential stock dividends that I receive from the company, too, if the company becomes profitable in the future.

Q And to the extent that a agreement is worked out that gets money to you but calls it consulting or something else, would you be willing to share some of the proceeds of the payments that you receive from IEC with your creditors?

A Absolutely.

Q Okay.

A You're talking about consulting fees, other types of fees in return for services—absolutely.

Q Now, sir, have you been pursuing any other line of business during the period since you filed for Chapter 7, thinking the company was—

[36] Yes, I have.

Q —dead?

A Yes, I have.

Q And what is that line of business?

A I've developed an independent contracting business as a professional charitable fund raiser for two charities in St. Louis. The first—should I go into more detail?

Q When was the first? When did it first begin?

A The first one was established in May of 1987.

Q Mr. Toibb, I am handing you a copy of what I have marked for the Court and am handing the Court as Exhibit Number 4. Can you identify that document?

A Yes. This is a letter from Rabbi Yitzchok Kleiman to yourself written last week which states that I've been serving as a consulting—a fund raising consultant with —for the St. Louis Rabbinical College since May of 1987, for the new building which they need to raise $2.5 million dollars. And I receive twenty percent whatever I raise as a commission.

Q And are—

A As an independent contractor.

Q Do you recognize Mr. Kleiman's signature?

[37] A Rabbi Kleiman's signature.

Q Rabbi Kleiman's signature.

A Yes, I do.

Q I hand you what has also—and I am also handing to the Court—and have marked as Exhibit Number 5. Can you identify that document sir?

A Yes, this is a letter to you from Jerry S. Stein, president of Jerry S. Stein Charities, along with The Food Bank, which says—which says that I am actively pursuing a fund raising for homeless persons in the St. Louis area for which I receive ten percent of what I raise as my fee.

Q I'm giving the Court a document marked Exhibit Number 6—

A Yes.

Q —sir, and I am handing you a copy of that document. Can you identify it for the Court?

A Yes. This a copy of receipts of amounts I have raised for the St. Louis Rabbinical College Building Fund, along with subsequently expenses I incurred and along

with fees—my fees on each commission and the amount I received as a check on—in the—to the right hand column.

Q Okay. And the expenses that are reflected on here are reimburseable expenses, are they not?

[38] A Right. Those are the—those are the ones that were reimbursed in checks. Some of them are not reimbursed.

Q You incur other expenses that are not reimbursed —

A Absolutely.

Q —do you know?

A Absolutely. Significant dri ing expenses in soliciting potential contributions; gasoline; photocopying; things like this.

Q Are you working out of your home, Mr. Toibb?

A I've worked both out of where I'm—my residence and out of the offices of the College and of Jerry Stein's office too. So, I work out of three locations.

Q And do these—or—

Q MS. FLEISSIG: for the purposes of the Court, your Honor, names were originally disclosed. The numbers are itemed—are numbered but those are each individual contributions. I didn't think any purpose would be served by disclosing those names.

Q And are your efforts as a private fund raiser for both of these charities continuing?

A Yes.

[39] Q And are you continuing to look for other opportunities and for the potential for opportunities in the energy field as well?

A Yes, I am. When I see—when I see opportunities arising in the alternative energy field in let's say—let's say a few months ago in San Francisco for example, or Los Angeles. You know, I talk to—I get on the phone and I send letters and I talk to people about my possibly joining those companies as an independent consultant.

Q Sir, since 1981 have you been employed as anything other than an independent contractor?

A No, always as independent contractor.

Q And how have you filed your tax returns?

A All of the deductions that were not allowed—that were not reimbursed by Independence Electric Corporation or these charities—but—they haven't been for this year. But, for 1984, 5 and 6, all my business deductions were itemized as Schedule C deductions on income—on my personal income tax returns as business deductions. And not as employee expenses, unreimburseable under Schedule 2106 or personal expenses under Schedule A.

Q And have—

A They have all been taken as Schedule C's.

[40] Q And have those amounts ever been disallowed by the IRS?

A They've never been disallowed by the IRS.

Q Thank you sir.

[41] DIRECT EXAMINATION

BY: JUDGE SCHERMER:

THE COURT: Mr. Toibb.

A Yes?

THE COURT: Have you received any funds from the Jerry S. Stein Charities Incorporated since January 1988?

A No, but I'm expecting a check at the end of this month. The checks—I expect the checks to be—they said the checks will be cut at the end of the month. And therefore I expect one in a couple—a few days.

THE COURT: And what monies have you earned from the Rabbinical College from May 1987 through November 1987?

A There were no monies received at that time because a brochure and other documents that had to be put together in order—in order to begin the fund raising effort. It took several months to create the brochure for the building, for which it became the sales document, or the contribution document, for which I would solicit contributions.

THE COURT: Now, for the period one year before that, between May of 1986 and May 1987, what was your source of income?

[42] A Parental support to a large extent. I moved back to St. Louis in September of 1986.

THE COURT: What was your source of income between April 1985, the date on which your consulting agreement was terminated, and the—and May of '86?

A Are you talking between May of '85?

THE COURT: Yes.

A And when, again?

THE COURT: Let's say the time you came back to St. Louis, that might be easier.

A That's September of '86.

THE COURT: Umm hmm.

A I would say that three resources of—of—of—

THE COURT: Income?

A Income in that time period. I would say there was income basically from, number one, parents; number two, friends who helped me out to some extent because they saw I was in trouble.

THE COURT: Is there a third source?

MS. FLEISSIG: You did receive payments from IEC later as result of negotiations, did you not Mr. Toibb?

A Well, I received in June of 1985—in '85, [43] back dated monies that was owed me for the amounts of April —April and—March and April that had been withheld to me.

THE COURT: Okay.

A In other words, the monies that had been withheld from me were ten thousand dollars.

THE COURT: So basically, since April of eighty—pardon me. Since April of '85 through current date, other than the funds listed on Exhibit 6—

A Yeah.

THE COURT: —your support has mostly been through friends and family?

A Yeah.

THE COURT: Now—

A I hope that—to change those significantly now. I might have basically been self-supporting since the first of this year. For the last three months since I began receiving significant fees from the Rabbinical College fund.

THE COURT: During the time of March 1983 through April 1985, when you were working under the consulting agreement, Exhibit 3, did you have any source of income other than the consulting agreement?

[44] A No.

THE COURT: Are you continuing to look for employment in the energy consulting field?

A Yes.

THE COURT: Are you desirous of re-entry into that field?

A Yes, very much so.

THE COURT: Is the charity raising a bridge between your current status and the status you wish to obtain—attain, which is being a consultant in the energy field?

A Yes.

MS. FLEISSIG: Mr. Toibb, if you don't get something in the consulting field, do you intend to keep working in the charity field?

A Absolutely. Because I mean—I, I think there's quite frankly room for me to do both.

THE COURT: Do you—would you categorize your use of Chapter 11 as a vehicle to retain your stock and to obtain an opportunity to work a settlement with your co-shareholders of IEC?

A I view it as a way to reorganize my debts, as a businessman—as an independent contractor. Through which I retain my property in life without liquidation. To that—

[45] THE COURT: What is your property in life, other than your stock of the company? And the clothes that you wear and your household goods.

A Yeah.

THE COURT: Do you have any property other than—

A No. My, my basic real financial asset is the stock in Independence Electric Corporation.

MS. FLEISSIG: Sir, do you also have a cause of action against—

THE COURT: Well, I understand his causes of action are numerous. Let me complete may examination and you can ask him anything you wish.

MS. FLEISSIG: I'm sorry, your Honor.

THE COURT: So do you—basically, you view your Chapter 11 as a means by which you can retain your stock and work a settlement then, or re-enter the energy consulting field with IEC?

A I would hope that would be a result.

THE COURT: All right. Miss Fleissig, anything further?

MS. FLEISSIG: Yes.

[46] RE-ELECT EXAMINATION

BY: MS. FLEISSIG:

Q Mr. Toibb, do you know approximately what the amount of your debts are?

A Today?

Q Today.

A Approximately a hundred and forty thousand, I think.

Q Okay. And were many of those debts directly business related?

A Absolutely.

Q Mr. Toibb, when you originally filed for Chapter 7, did you have any desire regarding those debts?

A I'm sorry?

Q When you originally filed for Chapter 7, did you have any desires regarding those debts?

THE COURT: What kind of desires do you refer to?

Q Did you seek to have your debts discharged?

A Yes, I sought to have my debts discharged.

Q And when you converted to Chapter 11, was it still your desire to work something out with your creditors so that in the—ultimately there would be a discharge of those debts?

[47] A Well, I worked out that it would be a discharge, but in the sense that they would be paid, you know, according to a reorg—, —a plan of reorganization.

[48] RE-DIRECT EXAMINATION

BY: JUDGE SCHERMER:

THE COURT: Ms. Fleissig, I believe he filed an 11 as a means, after he learned that IEC was a—not a dead company. That's why he converted the case.

(To the Witness) Of your hundred forty thousand dollars debt, sir, how much is related to your involvement with IEC? Percentage-wise, as your estimate.

Judging from the dates, it would appear that either they were related to IEC, or they were related to your schooling or living expenses; is that correct?

A I would say that roughly one-third is related to IEC; the schooling were a couple of small loans that were outstanding from years ago from college and law school. Those are the smaller amounts. And the living would be roughly the rest of—roughly the remainder of it. In fact, I would say forty percent would be—would be IEC related, when I think of all the travel I had to do to—

THE COURT: All right.

A Well, I—and you know, that includes like the business consulting and trying to obtain other [49] consultancies too, as far as my business development. Trying to, you know, hook on with other alternative energy companies or other types of business trips I took in trying to promote myself as an energy consultant.

THE COURT: Anything further of this witness, ma'am?

MS. FLEISSIG: Not on this issue, your Honor.

THE COURT: On any other issue?

MS. FLEISSIG: Well, I was not aware before I got here this morning that the motion to extend the exclusive period had also been scheduled. But I suppose we don't need any testimony from Mr. Toibb on that issue.

THE COURT: You may step down sir. Thank you.

If I may have your Exhibits there?

MS. FLEISSIG: Your Honor, I believe I gave you copies—

THE COURT: Okay.

MS. FLEISSIG: —of all of the originals.

THE COURT: All right.

MS. FLEISSIG: And I would move that they be admitted into the record at this time.

[50] THE COURT: Certainly they'll be received.

Now, Miss Fleissig, is there any legal argument you want to give me at this time?

MS. FLEISSIG: On this particular issue, your Honor, only that this bankruptcy is not an easy one. The issues are not easy ones, and I don't think the issue of who constitutes a proper debtor under Chapter 11 is a very easy one in this Circuit at this time.

Because of the amount of Mr. Toibb's debts, maybe even because of the interest that ran on Mr. Toibb's debts, he is not a debtor who can qualify for any type of reorganization under Chapter 13.

So, the only proceedings that are available to him are proceedings under Chapter 11 and proceedings under Chapter 7. There are numerous cases that have come down since the *Wamsganz* case in other Circuits which have recognized that Chapter 11 should be available to someone who has some income to try and attempt a Chapter 11 reorganization, because Chapter 13 is not available to them, and that cannot have been what was intended.

I also cite to your Honor the case of *In re*: *Markunes*—"M-A-R-K-U-N-E-S"—78 Br. 875, from [51] the Southern District of Ohio in 1987. That was a case I alluded to previous, your Honor. Although the Sixth Circuit had

ruled similar to *Wamsganz*, this is an attempt by that bankruptcy court to—

THE COURT: Clarify?

MS. FLEISSIG: —clarify what was meant. And, in that case, the—the debtor was permitted to remain in Chapter 11, although he had something like a thousand dollars a month coming in from a business upon which—in which that he was a shareholder. And they looked at him as is he basically an employee; is he basically a consumer with consumer debts.

And based upon a Sixth Circuit ruling similar to the Eighth Circuit's ruling, that Court held that he could remain a debtor in Chapter 11. I have a copy of the case if your Honor would like.

THE COURT: Thank you, ma'am. Thank you.

MS. FLEISSIG: And there are numerous other cases that have come down as well. They are not in our Circuit, so it's difficult to say what—what will happen in our Circuit. I believe that Mr. Toibb has two businesses that he is reorganizing.

[52] One is his efforts in the energy field. And while it—we, we would not pretend that maintaining his stock is of critical importance to Mr. Toibb, we think it's of critical importance. We think he had a legal right to it, given that the only other entities that want his stock—the only other entities for which there is any value in this stock, are the majority shareholders that have been trying to get his stock since 1985.

I don't think that this Bankruptcy Court is the proper forum to let them complete that process and also buy for themselves a release. Especially when those activities don't have any relation to the value of the stock.

But, as was admitted in Mr. Brown's own letter to this Court, I think if Mr. Toibb can retain his stock—or, even cannot retain his stock—that he has recourses available to him with IEC that may—that may turn a benefit for his creditors.

He is certainly willing to share those benefits. He has already offered the exact dollar amount for those shares that the trustee proposed to sell them for when this matter was in Chapter 7.

[53] THE COURT: What's the second business?

MS. FLEISSIG: The second business that he has, which he commenced prior to converting this case to Chapter 11, is as a private fund raiser, your Honor. These charities, especially the Rabbinical College, just started up when Mr. Toibb started up with it.

It takes time to print the brochures; to make mailings to people; and while the money is not coming in as much in the early months as it hopes to in the later months, he is certainly employed in that business. And the schedules reflect that he has received more than four thousand dollars in—in a period of a few months in those endeavors.

And he hopes to continue those endeavors. If he is kicked out of the Bankruptcy Court right now, every penny he gets for those endeavors is going to be attached by his creditors. And he will have no ability to pay—it will be attached by the most aggressive of his creditors.

And his creditors will not receive payment in any ordered sense, in any ordered proceeding. He is willing to share his—his assets that he gets out of this business with his creditors. And [54] I think that's what reorganization is all about.

Were he in Chapter 7, any dollars amounts that he received would be his and his own, for his own pocket. They would be post-petition dollars. I don't think that the proper alternative in a case like this is to throw Mr. Toibb out of the Bankruptcy Court, kill any chance he has for standing on his feet and making something either of IEC or his fund raising efforts, and letting the most aggressive of his creditors take those assets.

THE COURT: Okay. Well, I agree with you that the facts in this case, Miss Fleissig, are somewhat unus-

ual. And basically categorizes as a single asset case, that being his stock.

You would have me also believe there is a second major asset and that's his cause of action. But that again is related to his stock ownership, so I'll bundle them together.

MS. FLEISSIG: Certainly.

THE COURT: And so the man has stock, or an interest in a company which he would like to use as a vehicle to get back into the active relationship with that company as a consultant. And I think that is primarily the use of the [55] Chapter 11.

MS. FLEISSIG: But, your Honor, in that regard, it —it is not different than any other independent contractor whose services are essentially consultancy may be. Those people may have no assets other than their home and their car—

THE COURT: Umm hmm.

MS. FLEISSIG: —as well. And the question here is, are those people not to be permitted an opportunity to reorganize as well? In that regard, Mr. Toibb has perhaps more assets than they do.

THE COURT: Well, neither of us have found any cases on that particular situation. All right, let me do this. Let me take this under advisement, Miss Fleissig, and let's—

MS. FLEISSIG: Your Honor, my client has raised one other point to me.

THE COURT: It's always difficult to represent an attorney, isn't it?

MS. FLEISSIG: Yes, it is. Your Honor, my client makes the point that other companies with which he is talking now have raised the point to him that with the ownership of his stock he has [56] more credibility in this—in the energy consulting field.

However, so long as he is in bankruptcy owning that stock, that is not the case.

THE COURT: All right. What I'm going to do is take the—this matter under advisement. I'm going to

continue the exclusive period to a time in the future. I'll tie it to the time of my decision on the issue of qualifying under Chapter 11, and extend the period of time to confirm a plan sixty days beyond the date that the disclosure statement has to be approved.

MS. FLEISSIG: Thank you, your Honor.

THE COURT: Now—so, I think that will clarify everything else. I'll continue the hearing on the disclosure statement.

MS. FLEISSIG: Thank you, your Honor.

THE COURT: Thank you.

[57]

AFFIDAVIT

STATE OF MISSOURI)
) ss
COUNTY OF ST. LOUIS)

I, SHELDON BARUCH TOIBB, Debtor in the above cause, having been duly sworn upon by oath, hereby acknowledge that, to the best of my knowledge, information and belief, the audiotape record provided to Mary Y. Hardy, is an exact duplicate of the audiotape record of all of the proceedings conducted before the Honorable Barry S. Schermer on March 28, 1988, in the above styled bankruptcy, which was procured by me from the Clerk of the Bankruptcy Court, Eastern District of Missouri, Eastern Division.

/s/ Sheldon B. Toibb
SHELDON B. TOIBB

SUBSCRIBED AND SWORN to before me this 14th day of October, 1988.

/s/ Mary Y. Hardy
Notary Public

[Certification Omitted in Printing]

UNITED STATES BANKRUPTCY COURT

[Title Omitted in Printing]

Opinion and Order Granting Debtor Ten (10) Days From the Date of Order to Reconvert Case to One Under Chapter 7 of the Bankruptcy Code or Face Dismissal (Printed as Appendix to Petition For Writ of Certiorari, pp. A19-A29, A17-A18).

IN THE
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

No. 88-2026C(5)

IN RE: SHELDON BARUCH TOIBB,
Debtor-Appellant.

Appeal from the United States Bankruptcy Court
for the Eastern District of Missouri
Bankruptcy Case No. 86-02881

Honorable Barry S. Schermer,
Bankruptcy Judge

**BRIEF IN BEHALF OF DEBTOR-APPELLANT
SHELDON BARUCH TOIBB**

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TABLE OF CONTENTS

NOTE: Unless otherwise indicated, all transcript references refer to the Transcript on Appeal dated March 28, 1988.

TABLE OF CASES AND AUTHORITIES CITED

JURISDICTIONAL STATEMENT

This appeal, arising from the order of the United States Bankruptcy Court, Eastern District of Missouri, dated August 1, 1988, dismissing Debtor-Appellant's Title 11, Chapter 11 Reorganization case, falls within the appellate jurisdiction of the United States District Court pursuant to Title 28, Section 158(a) of the United States Code.

STATEMENT OF ISSUES

I. Was it error for the Bankruptcy Court, sua sponte, to dismiss Debtor's Chapter 11 Reorganization Case for alleged non-eligibility in the absence of any such request or contention by the Debtor's creditors?

II. Was it error for the Bankruptcy Court to dismiss Debtor's Reorganization Case pursuant to the *Wamsganz* decision, in light of Debtor's contention and uncontradicted testimony that he is engaged in business?

III. Was it error for the Bankruptcy Court to dismiss Debtor's Reorganization Case under the holding of the *Wamsganz* decision?

STATEMENT OF THE CASE

This is an appeal of a dismissal order of the Bankruptcy Court entered on August 1, 1988, dismissing Debtor's case under Chapter 11 of the Bankruptcy Code for his alleged failure to qualify as a Chapter 11 debtor. Said alleged failure to qualify was based on the Court's finding that the Debtor was not engaged in any "ongoing business which satisfies the Chapter 11 eligibility requirements as delineated in the Eighth Circuit's *Wamsganz* case". (See Memorandum Opinion of August 1, 1988.)

Debtor had previously filed a Voluntary Chapter 7 Petition on November 18, 1986. On October 2, 1987, by leave of Court, Debtor converted his case to one under

Chapter 11 of the Code. Thereafter, on March 8, 1988, the Court, *sua sponte*, entered an Order to show cause why the Debtor's Chapter 11 case should not be dismised for failure to qualify as a Chapter 11 debtor. It should be noted that said Order was entered on the day following a hearing on Debtor's proposed Section 1125 disclosure statement.

Pursuant to the Court's March 8th Order, a show cause hearing was held before the Bankruptcy Court, at which the Debtor and his counsel appeared. Although duly notified, none of Debtor's creditors appeared at said hearing, nor did any of them file a substantively similar adversarial motion requesting that Debtor's case be dismissed for failure to qualify as a Chapter 11 debtor.

At said hearing the Debtor testified that he was a licensed attorney who, through his work with the Federal Energy Regulatory Commission and a private law firm, had gained considerable expertise in the field of energy law. (T 11, 12). Subsequent to leaving said employment, Debtor became an independent consultant in that field and proceeded to formulate a business plan for the formation of an independent hydroelectric generation corporation. (T 12, 13). Debtor was then able to successfully market said plan to several interested entrepreneurs, who in turn formed a fledgling corporation, Independence Electric Corporation (hereinafter referred to as "IEC") to implement said plan. In exchange for his business plan, Debtor received a 24% stock interest in IEC, as well as other consideration. (T 15). Additionally, Debtor was able to negotiate and execute a consulting agreement with IEC as an independent contractor. (T 17-20). According to the testimony of the Debtor, he had an expectancy that said consultancy would continue indefinitely, based implicitly on the company's implementation of his business plan through final development of its hydroelectric generation facilities. (T 18). During this time, the Debtor incurred both substantial

personal and business debts in connection with his activities in this regard. (T 18-24).

In April of 1985, Debtor's consultancy was terminated in what he believed was a wrongful attempt by his two fellow shareholders to "squeeze out" the Debtor from his substantial equity interest in the emerging enterprise of IEC. (T 23). Thereafter, he retained legal counsel for the purpose of attempting to restore and protect his right to be a consultant with IEC and to protect his stock interest in the company. (T 25,26). Said retainer, in the amount of $6,000.00, was funded through a line of credit on his personal credit cards. (T 26). Said credit card account debt was in existence at the time that the Debtor filed for relief under Chapter 11. (T 25,26).[1] Similarly, Debtor also incurred additional indebtedness with retained counsel over and above his original retainer to his attorney.

Despite the termination of his consultancy with IEC, Debtor continued to actively pursue other consultancies with various concerns in the energy and utility fields. (T 29-31). He incurred unpaid debts in that regard, which were set forth on his schedule of liabilities. (T 31). Concomitantly, he continued to incur additional debt in order to track the progress of IEC, the company which he founded. (T 28).

During the summer of 1986, Debtor was led to believe, through the actions and representations of the controlling shareholders (i.e. IEC management), that the company had been abandoned. (T 31, 32).

Relying on this belief, the Debtor presumed his stock in IEC had become worthless (T 32). Accordingly, he filed a petition for Chapter 7 relief in November of 1986, having run up additional business related and personal

[1] Said debt is alluded to herein as an illustrative example of the entangled relationship between Debtor's personal debts and finances and his business activities.

debt in the interim period subsequent to his termination with IEC and the filing of his Chapter 7 petition. (See, e.g., Debtor's Schedule of Assets and Liabilities).

In January, 1987, Debtor learned that IEC had not been abandoned and was still actively pursuing its business interests and had gone forward on its license applications for the construction of its power plants. (T 33). That same month, IEC requested the services of the Debtor to solicit potential investors in the corporation's hydroelectric power sites. The corporation thereafter was able to obtain federal licenses for the construction of four power plants. (T 33).

The Debtor additionally testified to his reasonable expectancy of resuming his independent consultancy with IEC and that his continued unfettered control of his IEC shares were critical to such expectancy. (T 34). Additionally, his continued ownership of IEC stock was an important credibility factor in seeking out other consultancies in his field of expertise. (T 55).

Based on his substantial legal background, he additionally testified to his belief that in the event that the resumation of his consultancy could not be worked out with the remaining shareholders of IEC, he would have a very strong cause of action against said shareholders. (T 34). He further testified as to his willingness to share the proceeds of any IEC stock dividends, consultancy fees, stock repurchase, or any other workout with his fellow shareholders, with his creditors. (T 35). (See Debtor's Reorganization Plan of 2-1-88).

Debtor additionally developed a secondary line of business subsequent to the filing of his Chapter 7 petition and prior to his conversion to Chapter 11 as an independently contracting charitable fund raiser on a commission basis. (T 36-39). While some of his expenses in that endeavor are reimbursable, many are not (T 37, 38), and by implication, his ability to reorganize his financial situation

is a crucial prerequisite to continuing such activity. The Debtor viewed this secondary line of business as a bridging mechanism between his then current financial situation and time in which he would be able to obtain other energy related consultances. (T 44). In the event that the Debtor would not be able to ultimately secure such consultancies, the Debtor intended to continue this secondary line of business as a "fall back" position, although he maintained that his two lines of business were not mutually exclusive. (T 44). At the time of the show cause hearing, Debtor had already begun receiving significant fees in this secondary line of business. (T 43).

The Bankruptcy Court, however, in its memorandum opinion supporting its dismissal order, stated its finding that the Debtor was not engaged in the business of energy consulting, that his accrued debt was not related to his fund raising business, and that it could find no ongoing business which satisfied the Chapter 11 eligibility requirements as [allegedly] delineated in the Eighth Circuit's *Wamsganz* case. Memorandum Opinion of August 1, 1988. See also *Wamsganz v. Boatmen's Bank of DeSoto*, 804 F.2d 503, 505 (8th Cir. 1986). From said dismissal order and memorandum opinion the Debtor brings his appeal.

ARGUMENT

I. IT WAS ERROR FOR THE BANKRUPTCY COURT, SUA SPONTE, TO DISMISS DEBTOR'S CHAPTER 11 REORGANIZATION CASE FOR ALLEGED NON-ELIGIBILITY IN THE ABSENCE OF ANY SUCH REQUEST OR CONTENTION BY THE DEBTOR'S CREDITORS.

By virtue of the language and intent of the Bankruptcy Code, it is clear that the Bankruptcy Court's ability to dismiss a Chapter 11 case, *sua sponte*, is severely limited, if not outrightly prohibited. 11 U.S.C. 1112(b); *Warner vs. Universal Guardian Corporation*, 30 B.R. 528 (BAP 9th Cir., 1983); *In re Gusam Restaurant Corp.*, 737 F.2d 274 (2nd Cir., 1984). The language of Section 1112(b), which is the exclusive statutory dismissal mechanism in the case at bar, unequivocally states:

> "(b) Except as provided in Subsection (c) of this section [not applicable], *on request of a party in interest* or the United States Trustee, and after notice and a hearing, the court may convert a case under this Chapter to a case under Chapter 7 of this title or may dismiss a case under this Chapter, whichever is in the best interest of creditors and the estate, for cause, including . . . . ." [emphasis added]. § 1112 (b), supra.

As stated in part of its holding in *In re Warner*, supra, a 9th Circuit case factually similar to the present one:

> "But it is even more clear that the Court cannot dismiss on its own motion. That Congress consciously chose to deny the power to the bankruptcy court to dismiss on its own motion is evidenced by the fact that language in the Senate Bill permitting precisely this sort of action on the court's own motion was dropped in favor of the House version requiring the request for dismissal to be initiated by a party in interest."

Thus, it seems that Congress did not intend to imbue the Bankruptcy Court with the power to dismiss Chapter 11 cases on its own motion, regardless of the alleged basis for dismissal (other than the debtor's failure to file the necessary informational documents). Logically, this lack of spontaneous authority should include cases where the debtor's eligibility for Chapter 11 relief may be questionable.

There is a rational basis for this strict statutory constraint in cases when it appears to the court that an individual may not qualify as a Chapter 11 debtor. Firstly, in cases where the challenged eligibility is based upon whether the individual debtor is engaged in business, the question of whether said debtor is, in fact, in business is usually not a facially determinable or unequivocal matter. Both objective and highly subjective * factors must ultimately determine whether an individual's acts, endeavors, and enterprises constitute being engaged in business. If neither the debtor nor his creditors harbor such doubt as to whether the debtor is engaged in an ongoing business, it would seem both counterproductive and irrational to allow the Bankruptcy Court to interject an issue where none appears to exist.

Secondly, alternative procedural mechanisms exist to both the court and creditors to insure that none-eligible (i.e. non-business) debtors do not avail themselves of the benefits of Chapter 11. Needless to say, interested creditors can always file their own motion to dismiss for non-eligibility under Section 1112(b). The Court, arguably, can also deny a motion to convert to Chapter 11 when the record before it undisputably demonstrates

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* Subjective to both debtor and his creditors.

that the debtor is not engaged in business or is otherwise ineligible to convert to Chapter 11.*

Lastly, in the case of an original Chapter 11 filing, this debtor suggests that the Court clerk has the inherent power to refuse to accept such a petition for filing when said petition and its accompanying schedules incontrovertably show that the debtor is ineligible.

Thus, the statutory procedural scheme and its underlying rational basis clearly demonstrate that the Bankruptcy Court herein had no statutory power to invoke the question of this debtor's non-eligibility (as an alleged non-business debtor), and that its sua sponte dismissal of his Chapter 11 case was reversible error.

II. IT WAS ERROR FOR THE BANKRUPTCY COURT TO DISMISS DEBTOR'S REORGANIZATION CASE PURSUANT TO THE *WAMSGANZ* DECISION, IN LIGHT OF DEBTOR'S CONTENTION AND UNCONTRADICTED TESTIMONY THAT HE IS ENGAGED IN BUSINESS.

Even assuming that this Court could find some enabling basis for the Bankruptcy Court to dismiss Debtor's Chapter 11 case for non-eligibility, sua sponte, it is Debtor's position that the Bankruptcy Court's finding, in essence, that he was not engaged in business was erroneous, was unsupported by the factual record, and constistituted an abuse of discretion. In that light, the Court's dismissal of his Chapter 11 case under the *Wamsganz* holding, was reversible error.

Wamsganz vs. Boatmen's Bank of DeSoto, 804 F.2d 503 (8th Cir., 1986), is the somewhat anomalous holding of this Circuit that debtors who are not engaged in business may not seek relief absent special circumstances.

* The Bankruptcy Court in this case did approve Debtor's motion to convert to Chapter 11 on October 2, 1987, without raising any question as to his eligibility.

Wamsganz, at 505. The Bankruptcy Court herein, in its previously cited memorandum opinion, stated that it could find "no ongoing business which satisfies the eligibility requirements as delineated in the Eighth Circuit's *Wamsganz* case". Memorandum Opinion, supra, at page 5. Neither the Code nor the *Wamsganz* case, however, delineated any judicial test for determining whether a debtor is engaged in a business which would satisfy such eligibility requirements. To the best of this debtor's knowledge, there exists no criteria in the Code, nor in the decided cases of this or any other circuit, as to what constitutes being engaged in business. Nor is there any standard as to the burden of proof that a debtor must meet to demonstrate that he is, in fact, engaged in business, particularly when the issue of eligibility is raised by the Court on its own motion. Additionally, the Bankruptcy Court herein made no finding as to whether there were any special circumstances pursuant to the *Wamsganz* holding which would make the debtor eligible for Chapter 11, although the Court did acknowledge that this case was somewhat unusual. (T 54).

One could arguably assert, for example, that if the Bankruptcy Court has the power to raise the eligibility issue *sua sponte*, that the factual circumstances of the debtor's eligibility must be construed in the light most favorable to the debtor. If such is the case, then the Debtor's oft stated contention and his uncontradicted testimony (in both substance and effect) that he was and considered himself engaged in business would not support a finding to the contrary.[2]

The present case, however, is distinguishable from *Wamsganz*, insofar as the factual issue of whether the

[2] The absence of any ascertainable standard of proof as to the issue of whether the debtor is engaged in business further illustrates the impropriety of the court entertaining such issues on its own motion.

debtor is engaged in business, by virtue of the fact that the debtors in *Wamsganz* never contended that they were engaged in business. *Wamsganz* at 504. Distinguishably, the Debtor herein always contended that he was engaged in business, and his testimony could reasonably be construed to support that contention.

Equally important, the Bankruptcy Court, in its dismissal memorandum, made the specious argument that Debtor was "not currently engaged in the business of energy consulting". Memorandum, at 5. Because the Debtor, since the time of his entry into the energy consultation field, has always maintained his status as an independent contractor (see generally, Transcript on Appeal dated March 28, 1988), the actual and most important aspect of business of his energy consulting is the marketing of his consulting services in that field.

The "product" which the Debtor has been actively and continuously attempting to market is his services as an energy consultant. The actual performance and execution of such services is ancillary to the actual obtaining of consulting contracts. His situation would be somewhat akin, as an illustrative example, to that of a real estate broker who has not been able to effectuate an actual sale for a considerable period prior to his filing for Chapter 11 relief. While the reason for his inability to effectuate a sale may or may not be related to his financial situation (e.g. financial inability to entertain prospective purchasers) it would seem unimaginable that a bankruptcy court would find that said broker was not engaged in business if the broker was actively attempting to solicit prospective purchasers in some fashion. So too, has the Debtor herein been actively pursuing potential consultation agreements, and thus it was erroneous for the Court to make a finding to the contrary.

III. IT WAS ERROR FOR THE BANKRUPTCY COURT TO DISMISS DEBTOR'S REORGANIZATION CASE UNDER THE HOLDING OF THE *WAMSGANZ* DECISION.

Although the Debtor believes that it is unnecessary for this Court to reach a critical analysis of the validity of the *Wamsganz* holding as a basis for reversing the dismissal order of the Bankruptcy Court herein, nevertheless the Debtor strongly suggests that said holding is both contrary to the Code and the interest of Congress, and should be reexamined. Recognizing, however, the *stare decisis* constraints of *Wamsganz* within the Eighth Circuit, the Debtor will not herein attempt a lengthy exposition as to the rationality of the *Wamsganz* reasoning, but rather will call to this Court's attention the numerous circuits and jurisdictions which have expressly held contrary position to the holding in *Wamsganz*.[3] See, e.g. *In re Moog*, 774 F.2d 1073 (11th Cir., 1985); *In re Little Creek Development Co.*, 779 F.2d 1068, 1073 (5th Cir., 1986); *In re Winshall Settlor's Trust*, 758 F.2d 1136, 1137 (6th Cir., 1985); *In re Warner*, 30 B.R. 528, (9th Cir. BAP, 1983); *In re Russell*, 60 B.R. 42 (Bkrtcy. W.D. Ark 1985); *In re Markunes*, 78 B.R. 875 (Bkrtcy. S.D. Ohio, 1987); *In re McStay*, 82 B.R. 763 (Bkrtcy. E.D. Pa., 1988).

Most of the jurisdictions not bound by the Eighth Circuit's ruling in *Wamsganz* have chosen to adopt the holding of *Moog*, which unequivocally states that Chapter 11 relief is available to those debtors who are not engaged in business. Therefore, if the Court should choose to reexamine the Eighth Circuit's decision in *Wamsganz*, it is indisputably clear that a reversal of that holding and the adoption of the *Moog* holding would necessitate a reversal

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[3] Debtor would suggest that oral arguments would be a more appropriate forum for such discussion at this level of appellate proceedings.

of the Bankruptcy Court's dismissal of Debtor's Chapter 11 Case.

CONCLUSION

For the reasons stated herein, the dismissal order of August 1, 1988, entered in Debtor's case should be reversed and the case remanded to the Bankruptcy Court hereinbelow for further proceedings consistent with the status of said Reorganization Case as of the date of said order.

Respectfully submitted,

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UNITED STATES DISTRICT COURT

[Title Omitted in Printing]

Opinion and Order affirming the Order and Judgment of the United States Bankruptcy Court Dismissing Debtor's Reorganization Case Under Chapter 11 of the Bankruptcy Code (Printed as Appendix to Petition for Writ of Certiorari, pp. A9-A16, A8).

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 89-2120EM

IN RE: SHELDON BARUCH TOIBB,
Debtor-Appellant.

Appeal from the United States District Court
for the Eastern District of Missouri

District Court No. 88-2026C(5)
Bankruptcy Case No. 86-02881

Honorable Stephen N. Limbaugh
District Judge

PETITION FOR REHEARING EN BANC

Opinion Filed May 2, 1990

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IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Appeal No. 89-2120EM

IN RE: SHELDON BARUCH TOIBB,
Appellant.

PETITION FOR REHEARING EN BANC

Comes now Debtor/Appellant, pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure, and petitions the court herein to rehear his appeal en banc, and as grounds for such petition states as follows:

1. That this cause is an appeal from an order of dismissal from the United States Bankruptcy Court for the Eastern District of Missouri, as affirmed by the United States District Court for the Eastern District.

2. That on May 2, 1990, a three judge panel filed its per curiam opinion affirming the District Court's decision in the cause hereinbelow, a copy of said opinion being attached in the addendum hereto and made a part hereof.

3. That this appeal concerns, inter alia, the availability of [Title 11] Chapter 11 reorganization relief to alleged non-business debtors under the Bankruptcy Code.

4. That in its decision, the court herein exclusively relies on its previous holding in *Wamsganz v. Boatmen's Bank of DeSoto*, 804 F.2d 503 (8th Cir. 1986) that Chapter 11 relief is not available to non-business debtors; that said holding is directly contrary to the Eleventh Circuit's holding in *In re Moog*, 774 F.2d 1073 (11th Cir., 1985), the Fifth Circuit's holding in *In re Little Creek Development Co.*, 779 F.2d 1068 (5th Cir., 1986), the

Sixth Circuit's holding in *In re Winshall's Settlor's Trust*, 758 F.2d 1136 (6th Cir., 1985) and the Ninth Circuit's [Bankruptcy Appellate Panel] holding in *Warner v. Universal Guardian Corporation*, 30 B.R. 528 (BAP 9th Cir., 1983). Moreover, it appears that most district and bankruptcy courts within the other circuits are adopting the holding of *Moog*, i.e. that non-business individual debtors are eligible for Chapter 11. See e.g. *In re McStay*, 82 B.R. 42 (Bkrtcy. E.D. Pa., 1988); *Matter of Young*, 76 B.R. 376 (Bkrtcy. D. Del. 1987); *In re Greene*, 57 B.R. 272 (Bkrtcy. S.D. N.Y. 1986); *Grundy National Bank v. Shortt*, 80 B.R. 802 (W.D. Va. 1987); *In re Cook*, 98 B.R. 624 (Bkrtcy. D. Mass. 1989); *In re Fernandez*, 97 B.R. 262 (Bkrtcy. E.D. N.C. 1989).

5. Appellant believes that it would be appropriate for the Court en banc to rehear and review the decision herein and with it undertake a review of *Wamsganz*, due to the existing state of the relevant case law as described in Paragraph 4 hereinabove, and due to the following considerations:

(a) That under the *Wamsganz* holding, debtors falling within the exclusive jurisdiction of the 8th Circuit are unable to invoke a bankruptcy option presently and seemingly available to debtors falling within the jurisdiction of at least eight other circuits;

(b) The conflict in holdings between the 8th Circuit and other jurisdictions affects the availability of a substantive statutory remedy as opposed to a mere procedural or evidentiary point of law;

(c) The *Wamsganz* holding affects a potentially substantial number of consumer debtors who would not qualify for Chapter 13, such as those having consumer debts in excess of $100,000.00 due to catastrophic illnesses or those individuals with high employment related income, consumer debts in excess of the Chapter 13 limit, and a short term inability to

hold off their creditors due to catastrophic economic factors beyond their control (e.g. savings and loan or securities market failure). In addition, it affects those individuals whose particular financial circumstances make Chapter 11 a more feasible and desirable bankruptcy than Chapter 13.

(d) That to the best of Appellant's knowledge, this Court did not issue and has never reviewed, en banc, its holding in *Wamsganz*.

6. That for the reasons stated in Paragraphs 4 and 5 hereinabove, Appellant believes that this appeal raises questions of exceptional importance.

WHEREFORE, Appellant respectfully prays this Honorable Court to grant his request for an en banc rehearing of his appeal by this Court.

Respectfully submitted,

/s/ Jonathan W. Belsky
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I express a belief, based on a reasoned and studied professional judgment, that this appeal raises the following questions of exceptional importance:

1. Are [alleged] non-business debtors eligible for Chapter 11?

2. Can the Court raise the issue of presumed ineligibility for Chapter 11 as an [alleged] non-business debtor sua sponte?

/s/ Jonathan W. Belsky
JONATHAN W. BELSKY
Attorney for Appellant

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 89-2120

IN RE SHELDON BARUCH TOIBB,
Debtor

SHELDON BARUCH TOIBB,
Appellant.

On Appeal from the United States District Court
for the Eastern District of Missouri

Submitted: April 12, 1990
Filed: May 2, 1990

Before ARNOLD, Circuit Judge, ROSS, Senior Circuit Judge, and FAGG, Circuit Judge.

PER CURIAM.

Sheldon Baruch Toibb appeals the District Court's affirmance of the Bankruptcy Court's order dismissing his petition for reorganization under Chapter 11 of the Bankruptcy Code. We affirm.

Mr. Toibb filed a petition in bankruptcy under Chapter 7 of the Code in November of 1986. He then filed a motion to convert his bankruptcy proceeding to one under Chapter 11 eleven months later, and the Bankruptcy Court[1] granted the motion. On March 8, 1988, the Court issued an order to show cause why debtor's case should not be dismissed for Mr. Toibb's failure to qualify as a Chapter 11 debtor. The Court, after holding a hearing on the matter, found that debtor was not engaged in an ongoing business, as required to qualify for Chapter 11 relief under *Wamsganz v. Boatmen's Bank of DeSoto*, 804 F.2d 503 (8th Cir. 1986). It then ordered debtor to convert his case back to a Chapter 7 proceeding within 10 days, or the case would be dismissed. Mr. Toibb then appealed the Bankruptcy Court's decision to the District Court,[2] where the decision was affirmed.

Mr. Toibb now appeals to this Court from the District Court's affirmance. He argues that the Bankruptcy Court erred (1) in dismissing his case *sua sponte*, without any such request from his creditors, (2) alternatively, by holding that Chapter 11 relief is available to businesses only; and (3) by finding that he was not engaged in an ongoing business for the purposes of eligibility under Chapter 11. We conclude that the Bankruptcy Court did have authority to dismiss the proceeding *sua sponte*, and that the Bankruptcy Court was controlled by *Wamsganz*, 804 F.2d 503. We can also find no error in the Bankruptcy Court's finding that Mr. Toibb did not qualify as a business entitled to Chapter 11 protection.

Affirmed. See 8th Cir. R. 47B.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

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[1] The Hon. Barry S. Schermer, United States Bankruptcy Judge for the Eastern District of Missouri.

[2] The Hon. Stephen M. Limbaugh, United States District Judge for the Eastern and Western Districts of Missouri.

UNITED STATES COURT OF APPEALS

[Title Omitted in Printing]

Opinion and Order Denying Rehearing En Banc by Reason of the Lack of a Majority of the Active Judges Voting To Rehear the Case En Banc, and Denying Rehearing by the Panel (Printed as Appendix to Petition for Writ of Certiorari, pp. A2-A6, A7).

UNITED STATES SUPREME COURT

[Title Omitted in Printing]

Order Granting Petition for Writ of Certiorari entered 18 January 1991.

FEDERAL STATUTE INVOLVED
11 U.S.C. § 109

§ 109. Who may be a debtor

(a) Notwithstanding any other provision of this section, only a person that resides or has a domicile, a place of business, or property in the United States, or a municipality, may be a debtor under this title.

(b) A person may be a debtor under chapter 7 of this title only if such person is not—

(1) a railroad;

(2) a domestic insurance company, bank, savings bank, cooperative bank, savings and loan association, building and loan association, homestead association, credit union, or industrial bank or similar institution which is an insured bank as defined in section 3(h) of the Federal Deposit Insurance Act (12 U.S.C. 1813(h)); or

(3) a foreign insurance company, bank, savings bank, cooperative bank, savings and loan association, building and loan association, homestead association, or credit union, engaged in such business in the United States.

(c) An entity may be a debtor under chapter 9 of this title if and only if such entity—

(1) is a municipality;

(2) is generally authorized to be a debtor under such chapter by State law, or by a governmental officer or organization empowered by State law to authorize such entity to be a debtor under such chapter;

(3) is insolvent;

(4) desires to effect a plan to adjust such debts; and

(5)(A) has obtained the agreement of creditors holding at least a majority in amount of the claims of each class that such entity intends to impair under a plan in a case under such chapter;

(B) has negotiated in good faith with creditors and has failed to obtain the agreement of creditors holding at least a majority in amount of the claims of each class that such entity intends to impair under a plan in a case under such chapter;

(C) is unable to negotiate with creditors because such negotiation is impracticable; or

(D) reasonably believes that a creditor may attempt to obtain a transfer that is avoidable under section 547 of this title.

(d) Only a person that may be a debtor under chapter 7 of this title, except a stockbroker or a commodity broker, and a railroad may be a debtor under chapter 11 of this title.

(e) Only an individual with regular income that owes, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts of less than $100,000 and noncontingent, liquidated, secured debts of less than $350,000, or an individual with regular income and such individual's spouse, except a stockholder or a commodity broker, that owe, on the date of the the filing of the petition, noncontingent, liquidated, unsecured debts that aggregate less than $100,000 and noncontingent, liquidated, secured debts of less than $350,000 may be a debtor under chapter 13 of this title.

(f) Only a family farmer with regular annual income may be a debtor under chapter 12 of this title.

(g) Notwithstanding any other provision of this section, no individual or family farmer may be a debtor under this title who has been a debtor in a case pending under this title at any time in the preceding 180 days if—

(1) the case was dismissed by the court for willful failure of the debtor to abide by orders of the court, or to appear before the court in proper prosecution of the case; or

(2) the debtor requested and obtained the voluntary dismissal of the case following the filing of a request for relief from the automatic stay provided by section 362 of this title.

(Pub. L. 95-598, Nov. 6, 1978, 92 Stat. 2557; Pub. L. 97-320, title VII, § 703(d), Oct. 15, 1982, 96 Stat. 1539; Pub. L. 98-353, title III, §§ 301, 425, July 10, 1984, 98 Stat. 352, 369; Pub. L. 99-554, title II, § 253, Oct. 27, 1986, 100 Stat. 3105; Pub. L. 100-597, § 2, Nov. 3, 1988, 102 Stat. 3028.)

No. 90-368

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

SHELDON BARUCH TOIBB,
Petitioner,

v.

STUART J. RADLOFF, TRUSTEE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether individuals are barred under Section 109(d) of the Bankruptcy Code from reorganizing under chapter 11 unless they are engaged in business.

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IN THE

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Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF FOR PETITIONER

STATEMENT OF FACTS

Petitioner is an individual who sought relief under Title 11, chapter 11 of the United States Bankruptcy Code [1] because he believed that a reorganization offered him and his creditors more value than his only alternative, liquidation under chapter 7.[2] The courts below dismissed his petition, holding that, because petitioner had

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[1] 11 U.S.C. § 1101 *et seq.* (1988). All chapter and section references are to Title 11 of the United States Code (the "Bankruptcy Code" or "Code") unless otherwise indicated.

[2] 11 U.S.C. § 701 *et seq.* (1988).

no business, he could not proceed under chapter 11. The issue presented is whether chapter 11 is open to any "person," as provided in section 109(d) of the Bankruptcy Code, or whether chapter 11 is closed to individuals not engaged in business notwithstanding their ability to effectuate a plan of reorganization and reorganize successfully.

Petitioner is a licensed attorney who had gained expertise as an energy lawyer from March 1980 until September 1981 at the Federal Energy Regulatory Commission ("FERC").[3] Upon leaving FERC, he wrote a business plan to create an independent hydroelectric generation company and successfully marketed the plan to two independent investors. J.A. 128-132. In 1983, these investors formed Independence Electric Corporation ("IEC"). J.A. 96, 131-32. In exchange for his business plan, petitioner received 24% of the stock of IEC. *Id.* The two investors received the remaining 76% of IEC's stock. J.A. 96, 132. At the time, petitioner and IEC also signed a consulting agreement. Petitioner expected his consultancy to IEC to continue indefinitely. J.A. 132-38. Petitioner's consultancy to IEC continued, however, only until April 1985, when his agreement was terminated. He retained counsel, claiming that his consulting had been terminated in violation of the terms of the agreement, and seeking to protect his stock interest. J.A. 136-38.

In the summer of 1986, petitioner came to believe that the two other IEC investors had abandoned the company and thus that IEC's stock was worthless. J.A. 141-42. Accordingly, in November 1986, having debts which exceeded what he believed to be the value of his one significant established asset, the IEC stock, petitioner filed for protection under chapter 7 of the Bankruptcy Code

[3] Joint Appendix ("J.A."), at 128-29, 162. Citations to "Pet. App." are to the Appendix to Petition for Certiorari.

and a trustee was appointed to liquidate petitioner's estate.[4] Chapter 7 of the Bankruptcy Code permits a debtor to liquidate its assets for distribution to creditors. The chapter does not contemplate the continued operation of the debtor's business for more than a limited period.[5]

In 1987, after filing his chapter 7 petition, petitioner's belief about the value of his bankruptcy estate changed. Petitioner testified that in 1987 he learned that IEC's majority shareholders had not abandoned the company and had successfully pursued applications to FERC for licenses to construct and operate hydroelectric power plants.[6] He also concluded that he had causes of action against the majority IEC shareholders for "an improper attempt to squeeze [petitioner] out [of IEC] and for breach of fiduciary duty in connection with their activities after the formation of IEC." J.A. 115; *see also* J.A. 110, 142-43.

In the summer of 1987, at or about the time FERC first granted a license to IEC, the Board of Directors of IEC offered to purchase petitioner's stock for $25,000. The trustee sought to accept the offer and notified creditors that he would sell the stock absent a valid objection to the sale. J.A. 13-14. Thereafter, on September 21, 1987, petitioner filed a petition in the bankruptcy court to convert his case to a case under chapter 11 of the Bankruptcy Code, the chapter permitting debtors to avoid liquidation by reorganizing under a plan confirmed by the bankruptcy court. J.A. 15-16. Petitioner also objected to the sale of stock as the chapter 7 trustee had proposed, arguing that the sale would be unfair and inequitable and urging that he should be permitted an opportunity to reorganize his affairs under chapter 11. J.A.

[4] 11 U.S.C. §§ 701-766 (1988); J.A. 141-42.

[5] *See* Section 721 of the Bankruptcy Code, 11 U.S.C. § 721 (1988).

[6] Petitioner testified that FERC in fact issued one such license effective August 1, 1987 and licenses for three additional sites effective December 1, 1987. J.A. 96-97, 142.

17-20. On October 2, 1987, the bankruptcy court granted petitioner's petition to convert his case to chapter 11; discharged the trustee (including apparently any responsibilities in connection with the proposed sale of petitioner's IEC shares); permitted the petitioner to manage his own affairs as a so-called debtor-in-possession; and ordered the petitioner, among other things, to file a chapter 11 statement of financial affairs, a disclosure statement and a plan of reorganization. J.A. 21-23.[7]

On October 20, 1987, petitioner filed his statement of financial affairs, including the required schedules of his assets and liabilities. These schedules, as supplemented by an amendment executed February 1, 1988, reflect that petitioner had debts totalling $141,819.97, of which $137,619.34 consisted of unsecured claims without priority and $4200.63 consisted of a priority tax claim[8] which petitioner listed as disputed. Pet. App. 23; J.A. 39, 64. Petitioner also listed $1,170.00 in exempt property.[9] J.A.

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[7] Section 521(1) of the Bankruptcy Code requires a debtor to "file a list of creditors, and unless the court orders otherwise, a schedule of assets and liabilities, a schedule of current income and current expenditures, and a statement of the debtor's financial affairs." 11 U.S.C. § 521(1) (1988). *See also* Section 1112(e) of the Bankruptcy Code, 11 U.S.C. § 1112(e) (1988) (requiring chapter 11 debtors to file the information required by 11 U.S.C. § 521(1)). Section 1121 of the Bankruptcy Code permits the debtor to file a plan of reorganization. 11 U.S.C. § 1121 (1988). Section 1125(b) requires court approval, after notice and a hearing, of a written disclosure statement before acceptance or rejection of a plan may be solicited. 11 U.S.C. § 1125(b) (1988).

[8] The order in which claims will be paid from the estate is found in section 507. Certain tax claims are paid pursuant to section 507 (a)(7). 11 U.S.C. § 507 (1988).

[9] In connection with his chapter 7, petitioner had claimed this property to be exempt from the estate pursuant to section 522(b)(2)(A) of the Bankruptcy Code and Section 513.430 of the Missouri Statutes. Section 522(b)(2)(A) permits an individual to exempt from property of the bankruptcy estate "any property that is exempt under . . . state or local law that is applicable on the date of the filing of the petition at the place in which the debtor's domicile has been located. . . ." At the time he filed his bankruptcy petition, petitioner was domiciled in Missouri. Pursuant to Missouri Revised Statutes § 513.427, Missouri has "opted out" of the federal exemption scheme, and has made available to Missouri debtors only the Missouri exemption list. Petitioner had claimed as exempt property which is included in the Missouri list.

12, 54, 97-98. He also listed "[c]ontingent and unliquidated claims" against the two IEC business associates and his 400-share "interest" in IEC as assets having an unknown dollar value. J.A. 55, 65. His assets thus consisted principally of his 400 shares of IEC stock and the potential causes of action against the two remaining IEC shareholders. J.A. 153-54.

On February 1, 1988, petitioner also filed a Plan of Reorganization (the "Plan") and a Disclosure Statement pursuant to Sections 1121 and 1125(b) of the Bankruptcy Code. The Plan and Disclosure Statement indicated that petitioner had obtained a commitment for an unsecured loan of $25,000, which would be used to fund the Plan. J.A. 75-76, 94.[10] Specifically, petitioner would pay in full all administrative expenses of the bankruptcy case and the priority tax claim—estimated to be in the aggregate amount of approximately $10,000. J.A. 75-76, 91-93. Petitioner would pay the remaining $15,000 on a *pro rata* basis to general unsecured creditors. J.A. 92-93. Petitioner would also pay general unsecured creditors *pro rata*, until the principal amount of their claims had been paid in full, out of a fund composed of 50% of any dividends petitioner received on his IEC shares for a six-year period, 50% of the proceeds of the sale of his IEC stock should he decide voluntarily to sell the stock within that six-year period, and 100% of any amount he receives as a judgment or in settlement of any claim peti-

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[10] The $25,000 loan was proposed to be repaid from petitioner's personal income that he earned subsequent to confirmation of the Plan, including any dividends he received on his IEC shares. J.A. 94.

tioner files against the two remaining IEC shareholders and others. J.A. 75-76, 93-94, 114-15.

The Plan of Reorganization thus offered the possibility of paying unsecured creditors an amount greater than petitioner's creditors would have received in a liquidation under chapter 7.[11] Because petitioner could not receive any litigation or settlement proceeds until his creditors were paid 100% of the principal amount of their claims, the Plan was apparently designed to give petitioner an incentive to prosecute the lawsuit vigorously and to obtain a judgment notice or settlement that would pay in full his unsecured creditors and allow additional recovery to him personally.

On March 8, 1988, without passing on the adequacy of the Disclosure Statement [12] or providing the creditors an opportunity to vote for or against a proposed plan of reorganization, the bankruptcy court *sua sponte* entered an order to show cause why petitioner's chapter 11 case should not be dismissed for petitioner's failure to qualify as a chapter 11 debtor. J.A. 121. The order to show cause was apparently based on the court's concern that petitioner's filing was inconsistent with the Eighth Circuit's decision in *Wamsganz* v. *Boatmen's Bank of DeSoto*,

[11] On March 3, 1988, the bankruptcy court received a letter from one of the two remaining IEC shareholders, offering to pay $50,000 for petitioner's stock and a release of liability from all claims by the petitioner against himself, the second remaining shareholder and other officers, employees, and agents of IEC. J.A. 109-12, 100-02. As the letter required acceptance of the offer within 30 days from its receipt, J.A. 102, the court had no assurance that the $50,000 would be available if the court required conversion of petitioner's case to chapter 7.

[12] The bankruptcy court questioned whether any amendments to the Disclosure Statement were required by the letter referenced in footnote 11 that had been received after the Disclosure Statement was filed. J.A. 118.

804 F.2d 503 (8th Cir. 1980), permitting individuals to reorganize under chapter 11 only if they have businesses. At the hearing on the court's order to show cause, petitioner attempted to show that he had a business to reorganize. His counsel also argued that cases in other circuits have held, contrary to the Eighth Circuit's decision in *Wamsganz*, that chapter 11 is available to individuals not engaged in business. J.A. 151. No creditor appeared at the hearing or filed a pleading with the court in support of a dismissal of petitioner's chapter 11 case. J.A. 4, 122, 124.

On August 1, 1988, the bankruptcy court ruled that petitioner was not eligible for chapter 11 and ordered the dismissal of petitioner's case if he did not reconvert the case to one under chapter 7. The court rejected petitioner's contention that he had a business that could be reorganized pursuant to chapter 11.[13] Pet. App. 27-28. The court also held that the Eighth Circuit's rule in *Wamsganz* required it to dismiss the chapter 11 cases of individuals who did not have businesses, stating:

> Chapter 11 was designed to affect business rehabilitation and therefore "persons not engaged in business may not seek relief under chapter 11 of the Bankruptcy Code." This court must apply the position of the *Wamsganz* Court with respect to chapter 11 eligibility.

Pet. App. 24.

The United States District Court for the Eastern District of Missouri affirmed without specifically discussing petitioner's argument that chapter 11 is available to in-

[13] In the bankruptcy court, petitioner testified that he was attempting to reorganize his business as an energy consultant and that he also had earned money in a separate business as a private charitable fundraiser. J.A. 143-145. The bankruptcy court found these activities did not constitute "businesses" permitting reorganization under chapter 11 of the Bankruptcy Code. Pet. App. 24-25. Petitioner does not challenge the sufficiency of that finding in this Court.

dividual debtors who are not engaged in business. Pet. App. 9-16. The Eighth Circuit also affirmed, concluding in a brief opinion that:

> the Bankruptcy Court did have authority to dismiss the proceeding *sua sponte*, and that the Bankruptcy Court was controlled by *Wamsganz*, 804 F.2d 503. We can also find no error in the Bankruptcy Court's finding that Mr. Toibb did not qualify as a business entitled to chapter 11 protection.

Pet. App. 5.[14]

In view of a conflict in the circuits,[15] this Court granted the petition for certiorari on January 18, 1991.

SUMMARY OF ARGUMENT

I. Section 109(d) of the Bankruptcy Code states that any "person" eligible to be a debtor under chapter 7, with certain inapplicable exceptions, is eligible for chapter 11. There is no question that petitioner is eligible for chapter 7. Section 109(b) states that any "person," with certain inapplicable exceptions, is eligible for chapter 7. A "person" under section 101(37) is defined as an "individual, partnership or corporation," other than certain governmental entities. The plain meaning of these words is that, with certain inapplicable exceptions, all individuals are eligible for chapter 7, and ergo chapter 11 relief. When the language of an act is clear, as it is in this case, such language is to be given effect, without the necessity of further inquiry.

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[14] The Eighth Circuit denied petitioner's petition for rehearing *en banc* in which he asked the court to reexamine its decision in *Wamsganz* in light of the decisions in other circuits "that nonbusiness individual debtors are eligible for chapter 11." J.A. 177-78.

[15] The Eleventh Circuit held in *In re Moog*, 774 F.2d 1073 (1985) (per curiam), that consumer debtors could seek relief under chapter 11. *Moog* relied on the absence from the eligibility section for chapter 11 of any requirement that the debtor be engaged in an ongoing business, 774 F.2d at 1075, and on the legislative history to the Bankruptcy Code. 774 F.2d at 1074.

II. Chapter 11 represents a consolidation of chapter XI of the Bankruptcy Act and two other chapters. Nonbusiness individuals were eligible for relief under former chapter XI. Because Congress was aware of the practice and did not expressly, or even impliedly, indicate an intent to reverse this practice by preventing nonbusiness individuals from seeking chapter 11 relief, a business requirement should not be read into section 109(d). Congress knew how to limit eligibility for different forms of bankruptcy relief, and failed to do so here.

III. Furthermore, the legislative history to the Bankruptcy Code reveals that Congress expressly intended to make chapter 11 available to nonbusiness individuals. The Senate Report specifically stated that chapter 11 "permits individuals to use this chapter," and the House Report plainly contemplates that consumers would be eligible to use chapter 11.

IV. Petitioner's eligibility for chapter 11 relief is also consistent with the scheme of the Bankruptcy Code and with the policy underlying chapter 11. The Code's structure generally permits debtors to select between two or more chapters under which to file. Each chapter provides different advantages and disadvantages to a debtor. Congress left it to each debtor to analyze his situation and select the chapter which best suits his needs. Finally, permitting individual nonbusiness debtors to reorganize under chapter 11 fulfills the underlying policy of encouraging reorganizations over liquidations.

ARGUMENT

Petitioner is eligible for relief under chapter 11 for four reasons. First, the plain language of the Bankruptcy Code makes all persons, including individuals, eligible to be debtors under chapter 11. Second, chapter 11 represents the consolidation of three prior reorganization provisions, one of which was available to individual debtors not engaged in business, and there is no indication that Congress intended to change that element of the prior chapter. Accordingly, it should be presumed that Congress intended to maintain such eligibility in the new chapter 11. Third, the legislative history indicates that Congress intended that nonbusiness individuals would continue to be eligible for reorganization under chapter 11. Finally, permitting individual debtors without businesses to seek chapter 11 relief is consistent both with the structure of the Bankruptcy Code and the policy underlying chapter 11.

I. THE PLAIN LANGUAGE OF THE BANKRUPTCY CODE MAKES PETITIONER ELIGIBLE FOR RELIEF UNDER CHAPTER 11

It is well settled that unambiguous statutory language must be accepted as conclusive "in the absence of a 'clearly expressed legislative intent to the contrary.'" [16] Here, the Court should reverse because the statutory language unambiguously gives all individuals the right to proceed under chapter 11 and, as we discuss below, far from evincing a contrary intent, the legislative history supports the proposition that any individual, whether or

[16] *United States v. Turkett*, 452 U.S. 576, 580 (1981). *Accord Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980); *Blum v. Stenson*, 465 U.S. 886, 896 (1984); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 n.12 (1987); *United Savings Ass'n of Texas v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 379-80 (1988).

not engaged in business, is eligible for relief under chapter 11.[17]

The relevant statutory language is contained in section 109(d), which states that any "person" eligible to be a debtor under chapter 7, with certain exceptions not relevant here, is qualified to be a debtor under chapter 11.[18] There is no question that petitioner is eligible for chapter 7. Indeed, the Bankruptcy Court sought to force petitioner to utilize chapter 7, and it is quite clear that he qualifies for that chapter. Section 109(b) provides that any "person" may be a debtor under chapter 7, again with certain exceptions not pertinent here.[19] The

[17] This Court has also held in a long line of cases that when the language of an act is clear, as here, that language must be given effect without regard to extraneous evidence of legislative intent. *E.g., United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95-96 (1820); *United States v. Hartwell*, 73 U.S. (6 Wall.) 385, 395-396 (1868); *Caminetti v. United States*, 242 U.S. 470, 489-490 (1917); *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 492 (1947); *Central Trust Co., Rochester, N.Y. v. Official Creditors' Committee of Geiger Enterprises*, 454 U.S. 354, 359-360 (1982) (per curiam); *see INS v. Cardoza-Fonseca*, 480 U.S. 421, 452-453 (1987) (Scalia, J., concurring). An exception to this general rule is where the literal application of the statute would yield an "absurdity," *United States v. Hartwell*, 73 U.S. (6 Wall.) at 396, or a result "plainly at variance with the policy of the legislation as a whole." *Perry v. Commerce Loan Co.*, 383 U.S. 392, 400 (1966) (citation omitted); *accord United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242-243. This exception does not apply here. *See* Point IV *infra*.

[18] 11 U.S.C. § 109(d) (1988) (providing that stockbrokers and commodity brokers may not be, and railroads may be, chapter 11 debtors).

[19] 11 U.S.C. § 109(b) (1988). The "persons" who may not be chapter 7 debtors are railroads, insurance companies, banks, savings banks, savings and loan associations, building and loan associations, homestead associations and credit unions, whether such entities are domestic or foreign and doing business in the United States; and domestic "industrial bank[s] or similar institution[s] which [are] insured bank[s] as defined in Section 3(b) of the Federal Deposit Insurance Act . . . ." *Id.*

word "person" is defined in section 101(37) to mean an "individual, partnership or corporation," other than certain governmental entities.[20] The plain meaning of these words is that, with a few exceptions not relevant here, an individual who is eligible to be a debtor under chapter 7, such as petitioner, is also eligible to be a debtor under chapter 11.

Congress knew well how to limit eligibility under the Bankruptcy Code when it chose to do so. Chapter 13 is expressly limited to certain "individuals";[21] chapter 9 is only available to municipalities;[22] and only farmers are eligible for relief under chapter 12.[23] Even chapter 11 itself expressly excludes certain classes of persons, such as stockbrokers and commodity brokers (and expressly includes railroads, which are ineligible under chapter 7).[24] Congress also knew how to distinguish individuals engaged in business from consumers when necessary, as in section 1304 which specifically defines what constitutes being engaged in business for the purpose of defining the rights and duties of the debtor and the trustee in a chapter 13 proceeding.[25] What is striking here is the absence from the language of section 109(d), which determines eligibility for chapter 11, of even a hint of an intent to bar individual debtors not engaged in business, despite Congress's carefully crafted limitations on eligibility for other debtors.

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[20] 11 U.S.C. § 101(37) (1988) *as amended by* Pub.L. No. 101-647 (November 25, 1990).

[21] 11 U.S.C. § 109(e) (1988). *See* text at note 64 *supra* for a description of these limitations.

[22] 11 U.S.C. § 109(c) (1988).

[23] 11 U.S.C. § 109(f) (1988).

[24] 11 U.S.C. § 109(d) (1988).

[25] 11 U.S.C. § 1304 (1988); *see also* 11 U.S.C. § 1302(c) (1988).

II. CONGRESS DID NOT INTEND TO REVERSE THE PRACTICE UNDER CHAPTER XI OF THE BANKRUPTCY ACT OF PERMITTING NONBUSINESS DEBTORS TO REORGANIZE

This Court has held that "the normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific."[26] This rule applies with "particular care in construing the scope of bankruptcy codifications."[27] Here, the practice under the predecessor provisions to chapter 11 was to permit nonbusiness individual debtors to reorganize. In the absence of any "congressional intent to depart from [prior judicial] practice,"[28] it should be presumed that Congress intended to continue that practice in the codification of chapter 11 and that Congress intended that chapter 11 be made available to nonbusiness individual debtors.

Chapter 11 represents the consolidation of three reorganization provisions of the prior Bankruptcy Act.[29] Those provisions were, respectively, former chapter X,[30]

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[26] *Midlantic National Bank v. New Jersey Department of Environmental Protection*, 474 U.S. 494, 501 (1986) (restrictions on judicially-created abandonment power held included in subsequent codification of that power). *Accord Pennsylvania Dep't of Public Welfare v. Davenport*, 110 S. Ct. 2126, 2133 (1990) ("We will not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure.").

[27] *Midlantic National Bank*, 474 U.S. at 501.

[28] *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 208 (1983).

[29] *See* S. Rep. No. 989, 95th Cong., 2d Sess. 9 (1978) [hereinafter cited as S. Rep.], *reprinted in* 1978 U.S. Code Cong. & Admin. News 5897, 5795; H.R. Rep. No. 595, 95th Cong., 1st Sess. 223 (1977) [hereinafter cited as H.R. Rep.], *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6182.

[30] Bankruptcy Act §§ 101-276, 11 U.S.C. §§ 501-676 (1976) (repealed 1979). Former chapter X was designed for the reorganization of large companies, with widely dispersed ownership, a sig-

which provided for the reorganization of public companies, former chapter XI,[31] which provided for the reorganization of corporations, partnerships, and individuals, and former chapter XII,[32] which provided for the reorganization of certain noncorporate real estate entities.[33] Former chapter X was the only one of these pre-Code provisions that clearly excluded individuals.[34] While it may have been unusual for individuals not engaged in business to seek protection under former chapter XI, such relief was expressly contemplated by the Rules governing bankruptcy procedure under the Bankruptcy Act and was an accepted and noncontroversial practice.

The relationship between the Rules in effect under the Bankruptcy Act and former chapters XI and XIII provides the clearest evidence that individuals not engaged in business were eligible for relief under chapter XI. Those Rules contemplated that chapter XI was available to debtors who had filed under chapter XIII, and chapter XIII was only available to wage earners. Rule 11-3 thus provided that "[t]he petition under chapter XI may be an original petition or it may be filed in a bankruptcy, chapter XII, or chapter XIII case."[35] Because a peti-

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nificant level of publicly held securities, and a need to modify secured debts. *See SEC v. United States Realty & Improvement Company*, 310 U.S. 434 (1940).

[31] Bankruptcy Act §§ 301-399, 11 U.S.C. §§ 701-799 (1976) (repealed 1979).

[32] Bankruptcy Act §§ 401-526, 11 U.S.C. §§ 801-926 (1976) (repealed 1979).

[33] *See generally* H.R. Rep., *supra* note 29, at 220-223, *reprinted in* 1978 U.S. Code Cong. & Admin. News at 6179-183.

[34] Bankruptcy Act §§ 106(3), (5) and 126, 11 U.S.C. §§ 506(3), (5) and 526 (1976) (repealed 1979).

[35] Chapter XI Rule 11-3. *See also* chapter XI Rule 11-7, which stated in pertinent part:

> If a bankruptcy case or a case under chapter XII or XIII is pending by or against the debtor, any petition under chapter XI shall be filed therein and may be filed before or after adjudication.

tion for relief under chapter XIII could be filed only by a "debtor,"[36] which chapter XIII defined as a "wage earner who filed a petition under this chapter,"[37] and chapter XIII defined a "wage earner" as "an individual whose principal income is derived from wages, salary or commissions."[38] Individuals with businesses were not eligible for relief under chapter XIII.[39] In permitting debtors already engaged in a chapter XIII proceeding to commence a chapter XI case, the chapter XI Rules contemplated that chapter XI would be available to individuals without businesses.

Further evidence that the Bankruptcy Act contemplated chapter XI filings by individual nonbusiness debtors is found in the provision which prohibits filing an involuntary chapter XI against certain wage earners.[40] "Wage earner" for this purpose was defined as "an individual who works for wages, salary or hire, at a rate of compensation not exceeding $1,500 per year."[41] It is highly unlikely that any debtors who qualified as wage earners under this section would have also been engaged in busi-

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[36] Bankruptcy Act §§ 621, 622, 11 U.S.C. §§ 1021, 1022 (1976) (repealed 1979).

[37] Bankruptcy Act § 606(3), 11 U.S.C. § 1006(3) (1976) (repealed 1979).

[38] Bankruptcy Act § 606(8), 11 U.S.C. § 1006(8) (1976) (repealed 1979). Corporations and partnerships were not eligible for chapter XIII relief.

[39] R. Jordan & W. Warren, *Bankruptcy* 661 (2d ed. 1989).

[40] Bankruptcy Act § 379, 11 U.S.C. § 779 (1976) (repealed 1979).

[41] Bankruptcy Act § 1(32), 11 U.S.C. § 1(32) (1976) (repealed 1979).

[42] *See* Herbert, *Consumer Chapter 11 Proceedings*, 91 Com. L.J. 234, 241 (1986).

ness.[42] Non-affluent wage earners who were not engaged in business would not have needed protection against involuntary chapter XI proceedings unless it were the case that they were *otherwise* eligible for chapter XI.[43]

The courts also assumed in pre-Code cases that the former Bankruptcy Act permitted individuals without businesses to file under chapter XI.[44] Finally, contemporary commentators assumed that chapter XI would be

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[43] The legislative history of the Bankruptcy Code also reflects Congress's understanding that nonbusiness individuals were eligible to recognize under the former chapter XI. In explaining why eligibility for chapter 13 should be expanded to include small, self-employed businessmen, the House Report recognized that individuals, whether in business or not, were then eligible for former chapter XI. The report states:

> Even individuals whose primary income is from investments, pensions, social security, or welfare may use chapter 13 if their income is sufficiently stable and regular. The expansion of eligibility will enable many to work out arrangements with their creditors rather than seeking straight bankruptcy liquidation. *Under current law [the Bankruptcy Act], they are constrained to use Chapter XI, Arrangements,* which is too cumbersome a procedure for the small, self-employed businessman.

H.R. Rep., *supra* note 29, at 119, *reprinted in* 1978 U.S. Code Cong. & Admin. News, at 6080 (emphasis added) (footnotes omitted). One of the purposes of chapter 13 was thus to give wage earners an alternative to reorganization under the former chapter XI and its successor, chapter 11.

[44] In *White v. Board of Trade of the City of Chicago*, 492 F.2d 871 (7th Cir. 1974), the debtor was permitted to reorganize even though he apparently had no business to reorganize. Having surrendered his membership in the Board of Trade prior to the commencement of the chapter XI case, he no longer had this membership to claim as a business. In *Stolkin v. Nachman*, 472 F.2d 222 (7th Cir. 1973), the debtor was not regularly employed, although he had accumulated substantial assets as an investor. Neither debtor owned or operated a "business" in the sense of an ongoing enterprise with assets and liabilities (although the debtor in *White*, like the petitioner here, may have had a business before bankruptcy). *See also* Herbert, *supra* note 42, at 241.

available to nonbusiness debtors. In the last pre-Code edition of *Collier on Bankruptcy*, the authors wrote: A wage earner . . . may also file a petition for relief under chapter XI, as clearly recognized in section 379 [of the Act], even though other debtor relief chapters under the Act are available to him." [45]

Against this backdrop, Congress consolidated the three reorganization provisions of the Bankruptcy Act, including former chapter XI, into chapter 11 of the Bankruptcy Code. Neither the Bankruptcy Code nor the legislative history contains any indication that Congress sought to change the practice under the Bankruptcy Act permitting individuals not engaged in business to reorganize under former chapter XI. Absent a clear indication of congressional intent to the contrary, it must be presumed that when Congress created chapter 11 out of chapters X, XI and XII it did not intend to make any change in the accepted interpretation that individual nonbusiness debtors were eligible for reorganization under chapter XI.[46]

III. THE LEGISLATIVE HISTORY EVINCES CONGRESS'S INTENT TO MAKE ALL INDIVIDUALS ELIGIBLE FOR CHAPTER 11

The legislative history confirms that, in continuing the practice of permitting individuals without businesses to reorganize under former chapter XI, Congress did so

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[45] 9 J. Moore & L. King, *Collier on Bankruptcy* ¶ 10.15 at 589 (14th ed. 1978) (footnote omitted).

[46] The fact that former chapter X was not available to individuals without businesses is hardly significant. Indeed, former chapter X was a chapter that proved unsatisfactory and was rarely utilized. *E.g.*, R. Jordan and W. Warren, *supra* note 39, at 723 (describing chapter X as "virtually a dead letter" by the eve of the passage of the new Bankruptcy Code). And, as discussed below, there is no indication in the legislative history that Congress sought to do away with what had been available to such individuals in former chapter XI.

advertently and intended to make chapter 11 of the new Bankruptcy Code available to all individuals.[47]

The Senate Report expressly states that individuals are permitted to seek relief under chapter 11:

> Chapter 11, Reorganization, is primarily designed for businesses, but permits individuals to use the chapter. The procedures of chapter 11, however, are sufficiently complex that they will be used only in a business case and not in the consumer context.[48]

The House Report contains language to the same effect.[49] In short, although Congress assumed that consumers would not avail themselves of the opportunity to reorganize under chapter 11 in light of the complexity and expense entailed in such proceedings, it expressly acknowledged that chapter 11 would be available to individuals.

Nor is there any evidence that Congress sought to distinguish between individuals engaged in business and consumers. On the contrary, the House Report states that "[t]hough this report is divided between consumer debtors and business debtors, the bill itself makes no distinction."[50] The fact that the legislative history addresses in much greater detail the problems of reorganizing businesses[51] merely reflects the fact that Congress anticipated that few consumers would use chapter 11.[52]

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[47] *See* Herbert, *supra* note 42, 238.

[48] S. Rep., *supra* note 29, at 3, *reprinted in* 1978 U.S. Code Cong. & Admin. News, at 5789.

[49] H.R. Rep., *supra* note 29, at 6, *reprinted in* 1978 U.S. Code Cong. & Admin. News, at 5792.

[50] *Id.*

[51] *See, e.g.*, S. Rep., *supra* note 29, at 9, *reprinted in* 1978 U.S. Code Cong. & Admin. News, at 5795.

[52] The numerous references in chapter 11 to actions to be taken with respect to a debtor's business, *e.g.*, 11 U.S.C. §§ 1103(c)(2), 1106(a)(3) (1988), reflect merely the fact that most chapter 11 proceedings involve businesses. Similarly, chapter 7, which is undeniably available to nonbusiness debtors, also contains numerous references to actions to be taken with respect to a debtor's business. *E.g.*, 11 U.S.C. §§ 704(8), 721 (1988).

The House Report also expressly contemplated the availability of chapter 11 to "wage earners," who are defined as persons "whose principal income is derived from wages, salary or commissions."[53] In describing a change from the predecessor to chapter 13, the report states:

> Under current law [the predecessor to chapter 13], only a "wage earner" . . . may file a chapter XIII case. This limitation unnecessarily excludes small businessmen from the cheap and expeditious remedy of a wage earner plan. The distinction between a barber, grocer and worm digger who is self-employed from one who is an employee is slight. *H.R. 8200 eliminates the distinction in order to offer small sole proprietors as well as wage earners an alternative to Chapter 11.*[54]

In recognizing that the House bill gave "wage earners an alternative to chapter 11," the report necessarily also acknowledged that chapter's availability to persons without a business.

To sum up, the legislative history demonstrates in several places Congress's understanding that chapter 11 would continue to be available to all individuals, including those not engaged in business. Even if the legislative history can somehow be viewed as less than conclusive, it can hardly be said to evidence a clear legislative intent to bar individuals not engaged in business from seeking relief under chapter 11. Accordingly, there is no basis for this Court to "question the strong presumption that Con-

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[53] H.R. Rep., *supra* note 29, at 118-19, *reprinted in* 1978 U.S. Code Cong. & Admin. News, at 6079.

[54] *Id.* (emphasis added) (footnotes omitted).

gress expresses its intent through the language it chooses." [55]

IV. PERMITTING NONBUSINESS INDIVIDUAL DEBTORS TO SEEK CHAPTER 11 RELIEF IS CONSISTENT WITH BOTH THE STRUCTURE OF THE BANKRUPTCY CODE AND THE POLICY UNDERLYING CHAPTER 11

Chapter 11 relief for individual nonbusiness debtors is consistent with both the structure of the Bankruptcy Code and its underlying policies. The Code provides several avenues of relief, each of which presents certain advantages and disadvantages, and leaves it to the debtor to pick the course most advantageous to him. Moreover, depriving nonbusiness debtors of the opportunity to seek chapter 11 relief would frustrate a key policy of the Bankruptcy Code, namely, to permit debtors to reorganize where they are worth more on a going-concern than a liquidation basis.

A. Chapter 11 Relief for Nonbusiness Individual Debtors Is Consistent With the Structure of the Bankruptcy Code

Permitting nonbusiness individual debtors to seek relief under chapter 11 is entirely consistent with the structure of the Bankruptcy Code. Structurally, the Code consists of several chapters that provide different advantages and disadvantages.[56] Where a debtor is eligible for relief under more than one chapter, Congress left it to the debtor to weigh the economics involved and to select the

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[55] *INS v. Cardoza-Fonseca*, 480 U.S. at 432 n.12.

[56] The fundamental difference between a liquidation under chapter 7 and a reorganization under chapter 11 or chapter 13 is that in a liquidation, the debtor's non-encumbered, non-exempt assets, are reduced to cash and distributed to creditors, *see* text at note 58, *infra*, while in a reorganization the debtor retains all or some of his assets and pays his debts, which may be extended or reduced, primarily out of future cash flow, *see* text at notes 66 and 71 *infra*.

remedy that best fits the debtor's particular facts.[57] The fact that chapter 11 may provide certain advantages that chapters 7 and 13 do not is simply part of the calculus that must be performed by the debtor.

As we noted above, chapter 7 is broadly available to both individuals and entities. In a chapter 7 liquidation, a trustee is appointed to liquidate the assets [58] of the debtor and to distribute the proceeds to creditors in the priority specified by the Code.[59] At the conclusion of a liquidation under chapter 7, the debtor is given a discharge of all pre-filing debts,[60] except for certain non-dischargeable debts.[61] A debtor cannot obtain a discharge under chapter 7 if he has previously received a discharge in a case commenced within six years of the filing of the petition.[62] If his creditors meet certain statutory prerequisites, they can force the debtor into an involuntary liquidation under chapter 7.[63]

Chapter 13 provides for the reorganization of certain individuals with limited debts. Specifically, only individ-

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[57] *In re Silva*, 82 Bankr. 845, 846-847 (Bankr. S.D. Ohio 1987); *In re Ross*, 95 Bankr. 509, 510 (Bankr. S.D. Ohio 1988).

[58] Under section 522 of the Bankruptcy Code, certain property owned by the debtor is "exempt." Exempt property cannot be liquidated and sold for the benefit of unsecured creditors. 11 U.S.C. § 522 (1988).

[59] 11 U.S.C. §§ 704, 726 (1988).

[60] 11 U.S.C. § 727(a) (1988).

[61] 11 U.S.C. § 523 (1988). A variety of debts are not dischargeable under chapter 7, including certain tax obligations; debts for money obtained by false pretenses; alimony obligations; liabilities for fraud, embezzlement or larceny; liabilities for intentional torts; and fines or penalties owed to the government. 11 U.S.C. § 523(a) (1988).

[62] 11 U.S.C. § 727(a)(9) (1988).

[63] 11 U.S.C. § 303 (1988).

uals (and not corporations or partnerships) who have regular income and who have liquidated, unsecured debts of less than $100,000 and liquidated, secured debts of less than $350,000, may become debtors under chapter 13.[64] With limited exceptions, debts that are nondischargeable under chapter 7 *are dischargeable* under chapter 13.[65] In a chapter 13 proceeding, the debtor retains his assets and pays his debts out of future earnings pursuant to a plan that must be confirmed by the court.[66] Creditor approval is not required for confirmation of a chapter 13 plan, but the unsecured creditors' recovery must be at least equal to any alternative recovery under a chapter 7 liquidation.[67] A standing trustee oversees all of the chapter 13 cases in a particular district, and performs many of the same functions as a chapter 7 trustee.[68] Unlike a chapter 7 trustee, however, the standing trustee does not take possession of the debtor's property or business.[69]

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[64] 11 U.S.C. § 109(e) (1988).

[65] 11 U.S.C. § 1328 (1988), *as amended by* Pub. L. No. 101-508 (November 5, 1990) and Pub. L. No. 101-647 (November 29, 1990). As in chapter 7, alimony obligations are not dischargeable in chapter 13. 11 U.S.C. § 1328(a)(2) (1988).

[66] *See generally* R. Jordan & W. Warren, *supra* note 39 at 671. The chapter 13 plan cannot exceed five years in length. 11 U.S.C. § 1322(c) (1988).

[67] U.S.C. § 1325(a)(4) (1988). Moreover, the court can approve a chapter 13 plan over the objection of an unsecured creditor when the unsecured creditor is to receive under the plan full payment of its claim, 11 U.S.C. § 1325(b)(1)(A), or all of the debtor's disposable income, 11 U.S.C. § 1325(b)(1)(B). An objecting secured creditor is entitled either to retain the lien securing its claim or to obtain possession of the collateral securing its claim. 11 U.S.C. § 1325(a)(5) (1988).

[68] *See* 3 L. King, *Collier Bankruptcy Manual*, ¶ 1302.03, at 1302-4 (3d ed. 1990); 28 U.S.C. § 586 (1988), *as amended* by Pub. L. No. 101-509 (November 5, 1990).

[69] 11 U.S.C. §§ 1304, 1306(b) (1988).

Chapter 11 is available to any "person" who is eligible for liquidation under chapter 7, except for a stockbroker or commodity broker, plus any railroad.[70] In a chapter 11 proceeding, the debtor usually retains possession of his assets, although a trustee can be appointed.[71] Moreover, an unsecured creditors' committee must be appointed as soon as practical after the petition is filed.[72] The debtor has the exclusive right for 120 days to propose a reorganization plan.[73] After due disclosure is made,[74] creditors whose claims or interests would be impaired[75] by the plan have the right to vote by class on the plan.[76] The plan can be confirmed if approved by the requisite number of claimants possessing the requisite amount of claims within each class.[77] If a class dissents,

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[70] 11 U.S.C. § 109(d) (1988).

[71] *See* 11 U.S.C. § 1104(a). Trustees are seldom appointed in chapter 11, because there is a basic presumption that the debtor-in-possession knows its affairs better than anyone. If a trustee is appointed, its job will be to run the debtor's affairs and presumptively not to liquidate the debtor's assets.

[72] 11 U.S.C. § 1102(a) (1988).

[73] *See* 11 U.S.C. § 1121(b) (1988).

[74] Pursuant to 11 U.S.C. § 1125 the debtor-in-possession must file a disclosure statement.

[75] A class of claims or interests is "impaired" when the legal, equitable or contractual rights of the members of the class are altered. 11 U.S.C. § 1124 (1988).

[76] An impaired class of claims accepts the plan if at least two-thirds in amount and more than one-half in number of the allowed claims in the class that are actually voted are cast in favor of the plan. An impaired class of interests accepts the plan if at least two-thirds in amount of the allowed interests in the class that are actually voted are cast for the plan. *See* 11 U.S.C. § 1126(c)-(d) (1988). A class that is not impaired under a plan is conclusively presumed to have accepted the plan. 11 U.S.C. § 1126(f) (1988).

[77] 11 U.S.C. §§ 1126(c) and 1129(a)(8) (1988).

the court may nonetheless approve the plan if the "cram-down" provisions of section 1129 are met. An important requirement to cramming down a plan is that each dissenting creditor must receive at least as much as it would in a chapter 7 liquidation.[78] Another important cram-down requirement is the "absolute priority" rule, which requires that before any junior claim is paid at all, claims that are senior to it must be paid in full.[79] Confirmation of a chapter 11 plan results in most cases in a discharge of the same types of debts that are dischargeable in a chapter 7 liquidation.[80]

A court may reject a chapter 11 plan submitted in bad faith[81] and for cause may dismiss or convert the proceeding to a chapter 7 liquidation.[82] Cause includes any determination by the court that there is a continuing loss to the estate and an absence of a reasonable likelihood of rehabilitation or that the debtor is unable to effectuate a plan of reorganization.[83]

To summarize, chapter 7 offers to debtors the advantages of speed and minimal cost, although it results in the loss of nonexempt assets; chapter 13 offers debtors the broadest discharge of debts[84] and the ability of the

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[78] 11 U.S.C. § 1129(a)(7) (1988); *see generally* 2 L. King, *Collier Bankruptcy Manual*, ¶ 1100.01, at 1100-20 to 1100-23 (3d ed. 1990).

[79] *See* 11 U.S.C. § 1129(b)(2)(B) (1988).

[80] Chapter 11 debtors are subject to the nondischargeability provisions of sections 523 and 727(a) of the Bankruptcy Code. 11 U.S.C. §§ 1141(d)(2) & (3) (1988).

[81] 11 U.S.C. § 1129(a)(3) (1988); *see* 2 L. King, *supra* note 78, ¶ 1112.04, at 1112-29 to 1112-36.

[82] 11 U.S.C. § 1112(b) (1988); *see* 2 L. King, *supra* note 78, ¶ 1112.04, at 1112-17 to 1112-22.

[83] 11 U.S.C. § 1112(b) (1988).

[84] For example, a chapter 13 debtor who successfully completes a plan can receive a discharge of obligations arising out of fraud,

debtor to retain possession of his property without a creditors' committee overseeing the reorganization, although it is only available for some individuals with limited debts and requires payment of all disposable income into the debtor's plan; and chapter 11 offers debtors both the ability to maintain possession of the bankruptcy estate and greater flexibility in structuring a plan of reorganization, although it entails some additional delay and expense in connection with disclosure to creditors and administration of the creditors' committee and, except in the case of a "cram-down" plan, requires creditor approval for confirmation of a plan.[85]

Only in limited circumstances will it be more advantageous for an individual debtor without an ongoing business to pursue a chapter 11 reorganization. Most individual debtors will seek relief under chapters 7 or 13 due to the additional cost and complexity of chapter 11.[86] Still, some individual debtors, like petitioner, will prefer chapter 11. While it is difficult to generalize, chapter 11 may be in the best interests of an individual nonbusiness debtor and his creditors where the debtor is willing and able to inject fresh cash into the plan, or is not eligible for chapter 13,[87] or has some asset such as petitioner's

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see Pennsylvania Dep't. of Public Welfare v. Davenport, 110 S.Ct. 2126, 2134 (1990), or intentional torts, *see In re LeMaire*, 883 F.2d 1373, (8th Cir. 1989) *reh'g granted, vacated* 891 F.2d 650, *on reh'g*, 898 F.2d 1346, 1348 (1990). *See* 11 U.S.C. § 1328(a) (1988). In chapters 7 and 11 obligations arising from fraud and intentional torts are not dischargeable. 11 U.S.C. § 523(a)(6) (1988).

[85] *See* Herbert, *supra* note 42, at 240. For a more detailed discussion of the differences between chapters 7, 11 and 13, *see generally* Note, *Individual Consumer Debtors Are Eligible For Chapter 11 Relief*, 1988 Ill. L. Rev. 785, 786-790.

[86] *See, e.g.*, Herbert, *supra* note 42, at 238-239; Note, *supra* note 85, at 788.

[87] Even if chapter 13 is available, chapter 11 offers considerably more flexibility in formulating a plan, and depending on the facts and circumstances, the debtor and his creditors may conclude that such flexibility is needed to achieve the greatest possible recovery.

causes of action which may yield a substantial future recovery but cannot be expeditiously liquidated by a chapter 7 trustee for its present value.

The fact that chapter 11 is "primarily designed for businesses" [88] and the perhaps limited role that chapter 11 may have for individual debtors who are not engaged in an ongoing business in no way implies that it has no role to play. To the contrary, to bar nonbusiness individual debtors from chapter 11 would leave a lacunae in the Code that makes no sense. If individuals with substantial debts who are not engaged in business are barred from chapter 11, then their only remedy will be liquidation under chapter 7 which may well, as in this case, yield less value for creditors than reorganization.

Nor can the dollar limits on eligibility in chapter 13 be said to reflect some desire on Congress's part to provide an exclusive reorganization remedy for consumer debtors. Individuals with substantial debts were made ineligible for relief under chapter 13 in order "to make chapter 13 available to most consumer debtors and many small business debtors, leaving to chapter 11 cases involving larger amounts of debt." [89] The only reason that Congress believed that large debtors should not be permitted to proceed under chapter 13 was because of the weakened protections for creditors under chapter 13 [90] compared to those available under chapter 11.[91] Thus, the fact that

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[88] S. Rep., *supra* note 29, at 3, *reprinted in* 1978 U.S. Code Cong. & Admin. News, at 5789.

[89] R. Jordan & W. Warren, *supra* note 39, at 671.

[90] For example, chapter 13, unlike chapter 11, neither requires the debtor to file a comprehensive disclosure statement nor provides for an unsecured creditor's committee to oversee the case. 11 U.S.C. § 1301 *et seq.* (1988).

[91] As stated in the House Report:

> The bill places dollar limitations on the amount of debts of the proprietor who may use chapter 13, in order to prevent sole proprietors with large businesses from abusing creditors by avoiding chapter 11.

H.R. Rep., *supra* note 29, at 119, *reprinted in* 1978 U.S. Code Cong. & Admin. News, at 6080.

individuals with substantial debts, such as petitioner, are ineligible for chapter 13 reflects not an intent to force such individuals into liquidation but rather Congress's belief that any reorganization of such debtors should proceed under chapter 11.

B. No Policy Bars Nonbusiness Individual Debtors From Seeking Relief Under Chapter 11

The basic premise of chapter 11 is that a debtor may be worth more on a going forward basis than in liquidation.[92] In the business context, this may be because "assets that are used for production in the industry for which they were designed are more valuable than those same assets sold for scrap." [93] However, it is equally true that in the nonbusiness context, certain assets (such as the causes of action and shares owned by petitioner) may yield more value for creditors if managed or vigorously pursued by a debtor-in-possession in a reorganization case than if liquidated by a trustee in a fire sale. In either the business or nonbusiness context, the result in a successful reorganization is that creditors (and potentially the equity interests) will receive more value than they would otherwise receive in a liquidation.[94] In-

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[92] *See generally* H.R. Rep., *supra* note 29, at 220, *reprinted in* 1978 U.S. Code Cong. & Admin. News, at 6179.

[93] *Id.* A successful reorganization of a business will also preserve jobs. *Id.*

[94] One of the prerequisites for confirmation of a reorganization plan under chapter 11 is that all impaired holders must either accept the plan or receive not less than the amount they would receive under a chapter 7 liquidation. 11 U.S.C. § 1129(a)(7) (1988). In practice, holders cannot be expected to vote in favor of a plan unless they believe that their recovery will be at least as favorable as in a liquidation.

deed, the benefits of reorganization are so great that Congress has even made it impossible to waive the right to convert a chapter 7 liquidation proceeding to a reorganization under chapters 11, 12 or 13.[95] It is consistent with both the letter and spirit of the Code that nonbusiness individual debtors who are able to satisfy the demanding requirements of chapter 11 be permitted to do so. To hold otherwise would fly in the face of "the congressional goal of encouraging reorganizations." [96]

Finally, permitting individual debtors not engaged in business to seek relief under chapter 11 will not open the floodgates to abusive filings. The courts retain ample power to control any abusive filings that are made. A chapter 11 petition can be dismissed if the court determines, among other things, that it was brought in bad faith, that there is no reasonable likelihood of rehabilitation or that the debtor will be unable to effectuate a plan of reorganization that complies with the Code.[97] Other provisions of the Code ensure that creditors' interests will be protected.[98]

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[95] 11 U.S.C. § 706(a) (1988). *See also* H.R. Rep., *supra* note 29, at 380, *reprinted in* 1978 U.S. Code Cong. & Admin. News, at 6336 ("The policy of [Section 706] is that the debtor should always be given the opportunity to repay his debts.").

[96] *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 204 (1983).

[97] 11 U.S.C. §§ 1112(b), 1129(a)(3) (1988); *see* 2 L. King, *supra* note 78, ¶ 1112.04 at 1112-17 to 1112-22 and 1112-29 to 1112-36.

[98] No chapter 11 plan can be confirmed over the objection of creditors unless those creditors receive at least the amount they would receive in a liquidation under chapter 7. See *supra* note 94.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

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No. 90-368

IN THE
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v.

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On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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REPLY BRIEF FOR PETITIONER

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ARGUMENT

Conceding that "Section 109(d), which defines who may be a debtor under Chapter 11, contains no explicit ongoing business requirement," Brief of Amicus Curiae in Support of the Judgment Below ("Amicus Brief") at 4; *see also id.* at 10, the amicus cobbles together selected provisions of the Bankruptcy Code and legislative history in support of its claim that the Court should read such a requirement into the Code. The nub of the amicus's argument is that chapter 11's exclusive purpose is to reorganize "financially troubled business enterprises in order to keep them in operation, preserve jobs and protect in-

vestors," Amicus Brief at 5; *see also id.* at 4, and the Court is therefore justified in ignoring the statutory language to give effect to this purpose. Congress's explicit language cannot be so lightly disregarded, and the amicus has in any event misconceived the statutory purpose.

1. This argument overlooks a fundamental policy of the Bankruptcy Code, which is "to maximize the value of the estate." *Commodity Futures Trading Commission v. Weintraub*, 471 U.S. 343, 352 (1985). That policy is reflected in chapter 11's provisions permitting the debtor to liquidate under chapter 11 as an alternative to chapter 7 in order to maximize the value of the estate.

Section 1123(b)(4) of the Code specifically provides that a chapter 11 plan may "provide for the sale of all or substantially all of the property of the estate, and the distribution of the proceeds of such sale among holders of claims or interests." 11 U.S.C. § 1123(b)(4) (1988).[1] Indeed, a leading treatise recognizes that in some cases, liquidation under chapter 11 may be less expensive and more efficient than liquidation under chapter 7:

> By enabling the debtor to liquidate in the chapter 11 case rather than requiring conversion to a case under chapter 7, substantial costs might be avoided, such as the payment of trustee's fees and the fees of professionals which would have been employed by the trustee. In addition, due to the debtor's management's experience in dealing with the property of the estate, such management might be better able to dispose effectively of the property than would an independent trustee. Furthermore, the ability to utilize a chapter 11 plan for the effectuation of a liquidation may enable the liquidation to be accomplished over a relatively longer period of time, thus possibly optimizing the liquidation recoveries.

A. Herzog & L. King, 5 *Collier Bankruptcy Practice Guide* ¶ 90.04[4], at 90-24 (1990). These goals are also reflected in the petitioner's plan, which was designed to achieve the central purpose of maximizing the value of the estate.

In asserting that the only purpose of chapter 11 is to provide for the rehabilitation of financially troubled businesses, the amicus fails even to acknowledge the underlying Congressional goal of maximizing the value of the bankruptcy estate, *Weintraub*, 471 U.S. at 352, let alone attempt to reconcile that goal with its claim that nonbusiness debtors should be excluded from chapter 11.

2. The amicus also argues that "the legislative history conclusively confirms . . . that Chapter 11 is intended solely for business reorganizations." Amicus Brief at 11. To be sure, the legislative history contains many references to the business uses of chapter 11. But those references only demonstrate Congress's expectation that chapter 11 would be predominantly used by businesses. At the same time, the House and Senate Reports also contemplated that individuals without businesses would be eligible for chapter 11:

> Chapter 11, Reorganization, is primarily designed for businesses, but permits individuals to use the chapter. The procedures of chapter 11, however, are sufficiently burdensome that their use will only make sense in the business context, and not in the consumer context.

H.R. Rep. No. 595, 95th Cong., 1st Sess., at 6 (1977), *reprinted in* 1978 U.S. Code Cong. & Admin. News at 5968; S. Rep. No. 989, 95th Cong., 2d Sess., at 3 (1978), *reprinted in* 1978 U.S. Code Cong. & Admin. News at 5789. These reports thus make clear that chapter 11 was not exclusively designed for businesses, and that Congress

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[1] Other provisions which reflect the possible use of chapter 11 to effect a liquidation rather than a rehabilitation of the debtor include section 1129(a)(11), 11 U.S.C. § 1129(a)(11) (1988); section 1141(d)(3), 11 U.S.C. 1141(d)(3) (1988); and section 1123(a)(5)(D), 11 U.S.C. § 1123(a)(5)(D) (1988).

understood that consumers would use other chapters, not because they are ineligible for chapter 11, but rather to avoid chapter 11's complexity.[2]

3. Relying on *United Savings Ass'n, of Texas v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 380-81 (1988), and the fact that former chapter X was not available to individuals, the amicus also contends that "[t]here is no basis for 'presuming' that consumer debtors are eligible for relief under Chapter 11 simply because they were eligible for relief under [former chapter XI] . . . ." Amicus Brief at 19. While we acknowledge that former chapter X was limited to corporations while former chapter XI was available to individuals, the issue is whether Congress adopted the practice under one chapter over the other. Just as in *Timbers of Inwood Forest*, where this Court found that "Congress adopted the approach of Chapters X and XII," 484 U.S. at 381, the language of the Code and the legislative history here demonstrate that Congress chose the practice in former chapter XI of permitting individuals to reorganize over the practice in former chapter X limiting reorganization to corporations.

First, the plain meaning of sections 109 and 101(37) of the Bankruptcy Code is that, with certain inapplicable exceptions, all individuals who are eligible for chapter 7 are also eligible for chapter 11. The words of the statute thus provide a clear indication that Congress adopted the practice in former chapter XI of permitting individuals without businesses to reorganize. Chapter 11's availability to some individuals, which is conceded,[3] is a further indication that Congress chose the practice under

[2] In suggesting that Petitioner "is forced to concede that the legislative history he cites . . . is 'less than conclusive,'" the Amicus Curiae has distorted the argument in petitioner's main brief. Amicus Brief at 14 n. 8 (quoting Pet. Br. at 19).

[3] *See* Amicus Brief at 14 (asserting that certain statements in legislative history "should be interpreted to indicate that only individuals operating businesses may use chapter 11") (emphasis omitted).

former chapter XI over former chapter X, which was only available to corporations.[4]

Second, while chapter 11 represents a consolidation of former chapters X, XI and XII, the legislative history suggests that the consolidation was accomplished by permitting public companies to reorganize using the flexible procedures in former chapter XI, not by restricting chapter 11 reorganization to businesses. The legislative history is replete with statements indicating that "the more simple and expeditious procedures of chapter XI are appropriate in the great majority of cases," 124 Cong. Rec. 34005 (1978) (remarks of Sen. DiConcini), and that "chapter X has been far from a success." *Id.*[5] Concluding that "Chapter X was an anachronism," L. King, 5 *Collier on Bankruptcy* ¶ 1125.02, at 1125-12 (15th ed. 1990), the Code's sponsors consolidated the former reorganization chapters in part by "dismantling . . . the Chapter X scheme." *Id.* at 1125-14.[6]

[4] *See* section 126 of the former Bankruptcy Act, 11 U.S.C. § 526 (1976) (repealed 1979).

[5] *See also* 124 Cong. Rec. 32404 (1978) (remarks of Rep. Edwards) ("The House amendment deletes the 'public company' exception [to chapter 11 in the Senate bill], because it would codify well recognized infirmities of Chapter X, because it would extend the Chapter X approach to a large number of new cases without regard to whether the rigid and formalized procedures of Chapter X are needed, and because it is predicated upon the myth that provisions similar to those contained in Chapter X are necessary for the protection of public investors. Bankruptcy practice in large reorganization cases has also changed substantially in the 40 years since the Chandler Act was enacted. This change, in large part, is attributable to the pervasive effect of the Federal securities laws and the extraordinary success of the Scurities and Exchange Commission in sensitizing both management and members of the bar to the need for full disclosure and fair dealing in transactions involving publicly held securities."); 124 Cong. Rec. 34004 (1978) (remarks of Sen. DiConcini).

[6] Unlike *Timbers of Inwood Forest*, where the asserted practice was "far from clear," 484 U.S. at 381, here the amicus curiae does not dispute that former chapter XI was available to individuals without businesses.

4. The amicus also contends that the express limitations in the Code outside of section 109 on individuals permitted to proceed under chapter 7 [7] somehow supports the argument that this Court should create a non-statutory limitation against chapter 11 proceedings by individuals not engaged in business. Amicus Brief at 6-8. However, the very absence of similar statutory limitations with respect to consumer debtors suggests, in light of the comprehensive and detailed statutory scheme, that Congress did not intend to exclude consumer debtors from the scope of chapter 11.

5. The concern the amicus raises that individuals may not cooperate in involuntary chapter 11 cases, Amicus Brief at 15-16, can be dismissed for two reasons. First, Congress's decision to preclude involuntary chapter 13 cases was based on the unique requirement in chapter 13 that a plan "provide for the submission of all or such portion of future earnings or other future income of the debtor to the supervision and control of the trustee as is necessary for execution of the plan." 11 U.S.C. § 1322 (a)(1) (1988). Congress was concerned that requiring debtors to pay their disposable earnings to their creditors in involuntary chapter 13 cases could amount to involuntary servitude in violation of the thirteenth amendment and that debtors would refuse to cooperate in those circumstances.[8] However, no comparable provision in chap-

[7] Section 707(b) denies use of chapter 7 to an individual whose debts are primarily consumer debts if the debtor is able to pay those debts, 11 U.S.C. § 707(b) (1988). Section 727(a)(8) bars debtors from discharge under chapter 7 if they have been granted a discharge under chapter 7 or chapter 11 in a case commenced within six years of the current filing, 11 U.S.C. § 727(a)(8) (1988) and, contrary to the amicus, is not a section governing eligibility.

[8] The House Report states:

> The thirteenth amendment prohibits involuntary servitude. Though it has never been tested in the wage earner plan context, it has been suggested that a mandatory chapter 13, by forcing an individual to work for creditors, would violate this prohibition. On policy grounds, it would be unwise to allow creditors to force a debtor into a repayment plan. An unwilling debtor is less likely to retain his job or to cooperate in the repayment plan, and more often than not, the plan would be preordained to fail. Therefore, the bill prohibits involuntary cases under chapter 13, and forbids the conversion of a case from chapter 7, liquidation, to chapter 13, unless the debtor requests.

H.R. Rep. No. 595 at 120 (citations omitted), *reprinted in* 1978 U.S. Code Cong. & Admin. News at 6080-6081.

ter 11 requires the debtor to pay future wages to his creditors.[9] Any involuntary chapter 11 debtor who does not wish to commit future cash flow to repayment of his debts would be entitled to propose a plan of liquidation under chapter 11, which could be confirmed even over the objections of creditors so long as the creditors received not less than they would in a chapter 7 liquidation and the other "cram-down" requirements of section 1129 were met. Thus, no involuntary chapter 11 debtor can be compelled to toil for his creditors in violation of the strictures against involuntary servitude.

Second, the possibility that some individuals might refuse to cooperate if subjected to involuntary chapter 11 proceedings does not justify an absolute prohibition against the use of chapter 11 by individuals, and especially those who voluntarily commence chapter 11 cases. As noted above, those who wish a fresh start without the burdens of continuing payment obligations may propose liquidating plans. In addition, section 1112(b) permits the bankruptcy court to dismiss or convert an

[9] Section 1123(a), which lists the required contents of a chapter 11 plan, does not require the inclusion of future earnings. 11 U.S.C. § 1123(a) (1988). Nor are such earnings included in the property of the bankruptcy estate under section 541(a)(6). 11 U.S.C. § 541(a)(6) (1988). *See* L. King, 4 *Collier on Bankruptcy*, ¶ 541.19, at 541-102 (15th ed. 1990) ("Expressly excluded from this provision [section 541(a)(6)] are earnings from services performed by an individual debtor after commencement of the case.").

involuntary chapter 11 case to a case under chapter 7 "for cause," which would presumably include the debtor's recalcitrance or failure to cooperate in proposing or effecting a plan.[10] Because the Code gives the bankruptcy court considerable discretion in dealing with uncooperative debtors, the possibility that some individual debtors without businesses will be uncooperative in involuntary cases is no justification for an absolute rule barring all such individuals from using chapter 11.[11]

6. The claim that allowing a non-business debtor to proceed under chapter 11 somehow would enable him "to shield both his disposable income and his non-exempt personal assets from his creditors," Amicus Brief at 20; *see also id.* at 21, is likewise meritless. A chapter 11 plan may not be confirmed over the objections of creditors unless the creditors receive at least as much as they would in a chapter 7 liquidation.[12] If a consumer debtor chooses both to retain possession of his non-exempt assets and to shield his disposable income, then he will be required either to obtain fresh money from a third party or sell exempt assets in order to ensure that this requirement is met. In either event, chapter 11 provides no windfall to the debtor.

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[10] 11 U.S.C. § 1112(b) (1988) (listing examples of "cause").

[11] The argument of the amicus curiae that a chapter 13 case may be converted to a chapter 11 case only where the debtor is engaged in an ongoing business, Amicus Brief at 16, misconstrues the legislative history. Given that the overwhelming majority of chapter 11 cases are filed by businesses, the House Report's admonition to the court to consider the "nature of the debtor's business and other similar factors," H.R. Rep. No. 595 at 428, *reprinted in* 1978 U.S. Code Cong. & Admin. News at 6384, in exercising its discretion to convert a case from chapter 13 to chapter 11 can only be viewed as a reflection of one factor which should be considered when businesses are involved, and not a bar against conversions by consumer debtors.

[12] 11 U.S.C. § 1129(a)(7) (1988).

7. Finally, the court's considerable discretion to dismiss or convert chapter 11 cases to cases under chapter 7 "for cause" should alleviate any concern that the courts might be "flooded with suspect, jerry-built plans, which eventually would prove unworkable." Amicus Brief at 22. Chapter 11 plans brought in bad faith cannot be confirmed, 11 U.S.C. § 1129(a)(3) (1988), nor can chapter 11 plans be confirmed over the objection of creditors unless those creditors receive at least the amount they would receive in a liquidation under chapter 7, 11 U.S.C. § 1129(a)(7) (1988). In view of the ordinarily greater expense and the greater complexity of proceedings under chapter 11, individuals without businesses will in all likelihood commence chapter 11 cases only in the relatively rare circumstances where the creditors will receive at least what they would otherwise receive in a chapter 7 liquidation and the debtor has the potential to receive more than in a chapter 7 liquidation.[13] Accordingly, the possibility that some consumer debtors might inappropriately file chapter 11 petitions offers no support for the contention that this Court should read into the Code a flat prohibition against chapter 11 proceedings by individuals not engaged in business. To the contrary, forcing individual debtors who are not eligible for chapter 13, such as petitioner, into liquidation under chapter 7 serves no policy and benefits no one: not debtors, not creditors and not the public.

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[13] *See generally* Herbert, *Consumer Chapter 11 Proceedings*, 91 Com. L.J. 234, 233-239 (1986).

CONCLUSION

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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April 15, 1991

(6)

No. 80-[illegible]

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

SHELDON BASUCH TOBES,
Petitioner,

v.

STUART J. RADLOFF, TRUSTEE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF OF AMICUS CURIAE IN SUPPORT OF THE JUDGMENT BELOW

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QUESTION PRESENTED

Whether a consumer debtor who is not engaged in an ongoing business may proceed under Chapter 11 of the Bankruptcy Code, 11 U.S.C. § 1101 *et seq.*, which is designed to allow business reorganizations.

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BRIEF OF AMICUS CURIAE IN SUPPORT OF THE JUDGMENT BELOW

STATEMENT OF FACTS

In this case an individual consumer debtor, who does not operate a business, contends that Chapter 11 of the Bankruptcy Code,[1] which plainly was intended and designed to govern *business* reorganizations, is available to him and others in comparable straits.

From March 1983 until he was terminated in April 1985, Petitioner served as a consultant to the Independence Electric Corporation ("IEC") earning $50,000 per year plus expenses. Pet. App. A21.[2] IEC is a privately

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[1] 11 U.S.C. § 1101 *et seq.*

[2] The Appendix filed by Petitioner with his Petition for a Writ of Certiorari is cited as "Pet. App." The Joint Appendix filed herein is cited as "J.A." Petitioner's Brief is cited as "Pet. Br." The Brief of Respondent Stuart J. Radloff, the Chapter 7 Trustee, is cited as "Resp. Br."

held corporation organized to explore alternative energy opportunities. IEC's stock is owned by three individuals, including Petitioner who holds 24 percent of its shares. J.A. 129, 131-132. Since he lost his position with IEC in April 1985, Petitioner has had no regular source of income. His parents and friends have supported him. J.A. 58, 147.

Petitioner originally filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code [3] on November 18, 1986. Pet. App. A19. Petitioner filed under Chapter 7 because he thought his IEC stock "was totally worthless and the company was dead." *Id.* at 141. His filing disclosed (i) no secured debts, (ii) a disputed federal tax priority claim of $11,000, and (iii) unsecured debts of $170,605. He listed his non-exempt assets as his IEC stock and a "possible claim against business associates for breach of duty," but stated that the market value of both was "unknown." Schedules of Assets and Liabilities, Schedules A-1, A-3 and B-2 (October 30, 1986).

On August 6, 1987, Stuart Radloff, the Chapter 7 Trustee appointed to administer Petitioner's estate, notified Petitioner's creditors that the IEC Board of Directors had offered to purchase his stock for $25,000. J.A. 13-14. Realizing the stock had some value and solely to avoid its liquidation, Petitioner moved to convert his Chapter 7 case to one under Chapter 11. J.A. 15, 18, 150. The bankruptcy court granted the motion on October 2, 1987. J.A. at 21.

In his Chapter 11 Schedules of Assets and Liabilities, Petitioner listed a disputed federal tax priority claim of $4,200 and unsecured debts of $137,619. J.A. 64. Again, the only non-exempt assets he identified were his IEC stock and the possible claim against business associates, both having "unknown" value. *Id.* at 55, 12. He showed no income from any source other than his parents, who

[3] 11 U.S.C. §§ 701 *et seq.*

paid his monthly expenses. J.A. 57-58. Petitioner had no operating business to preserve, no employees to protect, and no business assets used in the production of income. Pet. App. A24-A28.

Petitioner filed a reorganization plan that proposed to pay his unsecured creditors $25,000, less administrative expenses and priority tax claims, which would result in an actual payment to unsecured creditors of approximately 11 cents on the dollar. He proposed to obtain the $25,000 to fund the plan by an unsecured loan from an unspecified source. He further proposed to pay unsecured creditors 50 percent of the dividends he might receive from his IEC stock and 50 percent of any proceeds from the sale of this stock during a six year period up to the principal amount of their claims, and also 100 percent of any amounts he might recover from his claims against his IEC associates. J.A. 76-77, 92-94, 114-115.

After notice and a hearing, the bankruptcy court ordered Petitioner either to convert his case to one under Chapter 7 or face dismissal. Pet. App. A17-A28. Relying on *Wamsganz v. Boatmen's Bank of De Soto*, 804 F.2d 503 (8th Cir. 1986), the court held that Petitioner did not qualify as a debtor under Chapter 11 because he was not engaged in an ongoing business that he sought to reorganize under protection of the bankruptcy laws. Pet. App. A27-A28. Upon Petitioner's refusal to convert to Chapter 7, the court dismissed the case. The District Court for the Eastern District of Missouri affirmed the bankruptcy court's decision, as did the Eighth Circuit Court of Appeals. *Id.* at A8-A16, A2-A7. This Court granted his Petition for a Writ of Certiorari on January 18, 1991. On January 22, 1991, the Court appointed undersigned counsel *amicus curiae* in support of the judgment below.

SUMMARY OF ARGUMENT

An individual debtor not engaged in an ongoing business does not qualify for relief under Chapter 11 of the Bankruptcy Code. Section 109 of the Code sets forth certain broad eligibility requirements for debtors under various Chapters of the Code. The Code, however, must be read as a whole and those eligibility requirements are further qualified by the provisions of each Chapter. For example, according to the definition in Section 109(b), a person may be a debtor under Chapter 7 "only if" the person is not one of certain specified entities. However, Sections 707(b) and 727(a) deny Chapter 7 relief to consumer debtors who are able to pay their debts or who have been granted a Chapter 7 discharge within six years. Similarly, although Section 109(d), which defines who may be a debtor under Chapter 11, contains no explicit on-going business requirement, such a requirement is evident from the provisions of Chapter 11. Reading the Code as a whole shows that Section 109, by eliminating certain debtors from those who may proceed under Chapters 7 and 11, does not automatically encompass all others.

Chapter 11 is specifically tailored to allow the reorganization of an on-going business, not the rehabilitation of a consumer debtor. The Chapter's fundamental provisions have no applicability in the consumer debtor context. Numerous courts thus have concluded that a debtor who does not have a viable business to restructure or employees to protect is not entitled to seek Chapter 11 relief.

The Code's legislative history requires this interpretation of the statute. The House Report conclusively demonstrates that Chapters 7 and 13 are the "only remed[ies]" available to consumer debtors. H.R. Rep. No. 595, 95th Cong., 2d Sess. 125 (1977), *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6086. The Senate Report states that "Chapter 11 deals with the reorganization of

a financially distressed business enterprise." S.Rep. No. 989, 95th Cong., 2d Sess. 9 (1978), *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 5795.

Other provisions of the Bankruptcy Code demonstrate that Chapter 11 is not intended for use by consumer debtors. Consumer debtors may *not* be forced into involuntary bankruptcy under Chapter 13,[4] which provides for the use of disposable income to repay creditors. The statute bars involuntary Chapter 13 petitions because an unwilling debtor cannot be forced to repay his creditors. Creditors, however, may force debtors into involuntary bankruptcy under Chapter 11. If Chapter 11 applies to consumer debtors, such debtors could be forced into involuntary reorganization plans, despite the fact that they would be no more likely to cooperate in such plans than Chapter 13 debtors would be to cooperate in involuntary repayment plans.

Allowing consumer debtors to use Chapter 11 is inconsistent with its purposes. Chapter 11 authorizes the reorganization of financially troubled business enterprises in order to keep them in operation, preserve jobs and protect investors. No such purposes would be served by permitting consumer debtors to reorganize under Chapter 11. Consumer debtors may seek relief under Chapter 7 or Chapter 13 of the Bankruptcy Code. Chapter 11 should not be made available to consumer debtors, such as Petitioner, merely because they cannot qualify under Chapter 13 and wish to avoid Chapter 7 liquidation.

Indeed, allowing consumer debtors to proceed under Chapter 11 would permit them both to protect their nonexempt assets *and* their postpetition disposable income—an expansive beneficial result not provided by any other Chapter that Congress evidently did not intend. If consumer debtors thought they might gain such protections under Chapter 11, the bankruptcy courts might well be

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[4] 11 U.S.C. § 1301 *et seq.*

inundated with attenuated, unworkable plans from such debtors.

ARGUMENT

The Eighth Circuit correctly held that Petitioner, an individual debtor not engaged in an ongoing business, is not eligible for Chapter 11 relief. The Fifth and Sixth Circuits similarly have determined that Chapter 11 is designed "to assist financially distressed business enterprises by providing them with breathing space in which to return to a viable state," and is not available to an individual consumer debtor with no business to reorganize. *In the Matter of Little Creek Development Co.*, 779 F.2d 1068, 1073 (5th Cir. 1986); *In the Matter of Winshall Settlor's Trust*, 758 F.2d 1136, 1137 (6th Cir. 1985). Petitioner's contention that individuals without businesses may proceed under Chapter 11 is not supported by the language of the Bankruptcy Code, its legislative history, or the policy underlying it.

I. THE BANKRUPTCY CODE, READ AS A WHOLE, DOES NOT ALLOW EVERY INDIVIDUAL DEBTOR TO PROCEED UNDER CHAPTER 7 OR 11

Section 109 of the Bankruptcy Code defines who may be a debtor under its various chapters. 11 U.S.C. § 109. Section 109(b) provides that a person may be a debtor under Chapter 7 "only if" the person is not a railroad, banking institution or insurance company. Section 109(d) provides that "only a person" that may be a debtor under Chapter 7 (except a stockbroker or commodity broker) and a railroad may be a debtor under Chapter 11. Because Section 109(d) does not explicitly preclude individuals who are not engaged in business from qualifying as debtors under Chapter 11, Petitioner and Respondent contend that the statute plainly grants all individuals the right to proceed under Chapter 11. Pet. Br. at 10-12; Resp. Br. at 9-12.

The issue, however, is not as simple as Petitioner and Respondent would have the Court conclude. When Section 109(b) and (d) are read in conjunction with other provisions of the Bankruptcy Code, it becomes clear that not all individual debtors are entitled to proceed under Chapters 7 or 11. Certain individual debtors, for example, are not entitled to proceed under Chapter 7, despite the fact that they are not specifically precluded from so doing by the language of Section 109(b). In other words, as shown momentarily, Section 109(b), by eliminating some debtors from its coverage, does not automatically encompass all others in the category that may proceed under Chapter 7.

First, however, we mention a commonplace of statutory interpretation. " 'The true meaning of a single section of a statute . . . cannot be ascertained if it be considered apart from related sections. . . .' " *Commissioner of Internal Revenue v. Engle*, 464 U.S. 206, 223 (1984) (quoting *Helvering v. Morgan's, Inc.*, 293 U.S. 121, 126 (1934)). In construing a statute, " 'the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute . . . and the objects and policies of the law. . . .' " *Stafford v. Briggs*, 444 U.S. 527, 535 (1980) (quoting *Brown v. Duchesne*, 19 How. 183, 194 (1857)). *See, Richards v. United States*, 369 U.S. 1, 11 (1962) ("a section of a statute should not be read in isolation from the context of the whole Act"). With respect to the Bankruptcy Code, this Court recently confirmed that "[s]tatutory construction . . . is a holistic endeavor" and the meaning attributed to a particular provision must produce a substantive effect consistent with related provisions of the Code. *United Savings Ass'n of Texas v. Timbers of Inwood Forest Assoc., Ltd.*, 484 U.S. 365, 371 (1988). The bankruptcy laws, this Court has said, must not be interpreted in a way that leads to "absurd or futile results." *Perry v. Commerce Loan Co.*, 383 U.S. 392, 400 (1966) (quoting *United States v. American Trucking Ass'ns.*, 310 U.S. 534, 543 (1940)).

Contrary to the assertions of Petitioner and Respondent (Pet. Br. at 11-12; Resp. Br. at 10-12), the Section 109 restrictions on a person's eligibility to proceed under various chapters of the Bankruptcy Code are *not* exclusive. For example, an individual who qualifies as a Chapter 7 debtor under Section 109(b), but whose debts are primarily consumer debts that he is able to pay, will be denied use of Chapter 7 pursuant to 11 U.S.C. § 707(b), because the grant of liquidation relief in such circumstances would constitute a "substantial abuse of the provisions of this chapter."[5] *See, In re Walton*, 866 F.2d 981, 984-985 (8th Cir. 1989) (consumer debtor who has ability to repay creditors not entitled to voluntary Chapter 7 relief); *In re Krohn*, 886 F.2d 123, 127 (6th Cir. 1989) (consumer debtor's ability to repay debts justifies denial of access to Chapter 7 relief); *In re Kelly*, 841 F.2d 908, 915 (9th Cir. 1988) (consumer debtor's ability to repay debts for which discharge is sought precludes Chapter 7 relief). In addition, a person qualifying as a Chapter 7 debtor under Section 109(b) is barred from obtaining relief if he has been granted a Chapter 7 or Chapter 11 discharge in a case commenced within six years of the current filing. *See* 11 U.S.C. § 727(a)(8).

Similarly, as now shown, a consumer debtor who is not engaged in business is not qualified to proceed or obtain relief under the reorganization provisions of Chapter 11. To allow such a person to commence a Chapter 11 case just because he is not expressly excluded by Section 109(d)'s threshold definition would be a futile gesture.

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[5] Section 707(b) authorizes the court to dismiss a Chapter 7 case in such a situation. It does *not* provide for reorganization as Respondent suggests. (Resp. Br. at 14).

II. THE LANGUAGE OF CHAPTER 11 DEMONSTRATES CONCLUSIVELY THAT IT WAS DESIGNED AND INTENDED FOR BUSINESS DEBTORS, NOT CONSUMER DEBTORS

The provisions of Chapter 11 are plainly tailored to allow and facilitate the reorganization of an ongoing business, not the rehabilitation of an individual consumer debtor. For example:

- Section 1102(a)(1) of Chapter 11 authorizes the appointment of an *equity security holders* committee.
- Section 1103(c)(2) authorizes a committee appointed under Section 1102 to "investigate . . . the operation of the debtor's *business* and the desirability of the continuance of such *business*. . . ." (emphasis added)
- Section 1104 authorizes the court to order the appointment of a trustee "for cause, including fraud, dishonesty, incompetence, or *gross mismanagement of the affairs of the debtor by current management*. . . ." (emphasis added)
- Section 1105 authorizes the court to terminate a trustee's appointment and "restore the debtor to possession and management of the property of the estate and of the operation of the debtor's *business*." (emphasis added)
- Section 1106(a)(3) authorizes a trustee to "investigate . . . the operation of the debtor's *business* and the desirability of the continuance of such *business*. . . ." (emphasis added).
- Pursuant to Sections 1107(a) and 1108, the debtor-in-possession or the trustee is authorized to "operate the debtor's *business*."
- Section 1113 addresses collective bargaining agreements and Section 1114, the payment of insurance benefits to retired employees.

- Pursuant to Section 1141(d)(3), a debtor is not discharged by the confirmation of a plan if the plan provides for liquidation of all or substantially all of the property of the estate and "the debtor *does not engage in business* after consummation of the plan."

These basic provisions have absolutely no applicability in the consumer debtor context. Rather, they demonstrate that Chapter 11 was intended and designed for financially troubled business enterprises endeavoring to continue in operation while they restructure their debts. *See Winshall Settlor's Trust*, 758 F.2d 1136, 1137.

Although the Bankruptcy Code does not explicitly require that a Chapter 11 debtor have an ongoing business, numerous courts properly have held that such a requirement is inherent and implied in the provisions of that Chapter. *See, e.g., Wamsganz v. Boatmen's Bank of DeSoto*, 804 F.2d 503 (8th Cir. 1986); *In the Matter of Little Creek Development Co.*, 779 F.2d 1068 (5th Cir. 1986); *In the Matter of Winshall Settlor's Trust*, 758 F.2d 1136 (6th Cir. 1985); *In re Lange*, 75 Bankr. 154 (Bankr. N.D. Ohio 1987); *In re Roland*, 77 Bankr. 265 (Bankr. D. Mont. 1987); *In re Bendig*, 74 Bankr. 47 (Bankr. D. Conn. 1987); *In re Penn Realty Trust*, 4 Bankr. 226 (Bankr. D. Mass. 1980). "[I]f there is not a potentially viable business in place worthy of protection and rehabilitation, the Chapter 11 effort has lost its *raison d'etre* . . . ." *Winshall Settlor's Trust*, 758 F.2d at 1137 (quoting *In re Ironsides, Inc.*, 34 Bankr. 337, 339 (Bankr. W.D. Ky. 1983)).

A debtor must act in good faith in filing a voluntary Chapter 11 petition and the failure to do so may constitute cause for dismissal under 11 U.S.C. § 1112(b). Among the factors courts examine in determining whether a debtor has petitioned in good faith is whether the debtor is engaged in an ongoing business that can be reorganized as contemplated by the statute. *Winshall*

Settlor's Trust, 758 F.2d at 1137; *Wamsganz*, 804 F.2d at 540-505; *Little Creek Development Co.*, 779 F.2d at 1073. Where a debtor does not have a viable business to restructure or employees to protect, he should not be afforded Chapter 11 reorganization relief.[6] *Id.*

III. THE LEGISLATIVE HISTORY CONCLUSIVELY CONFIRMS WHAT THE BANKRUPTCY CODE ITSELF DEMONSTRATES—THAT CHAPTER 11 IS INTENDED SOLELY FOR BUSINESS REORGANIZATIONS

The legislative history of the Bankruptcy Code shows that ongoing business enterprises are the intended candidates for Chapter 11 reorganization relief. Indeed, the House Report demonstrates conclusively that Chapters 7 and 13 provide the "only remed[ies]" available to consumer debtors.

The Senate Report unambiguously provides that:

> Chapter 11 deals with the *reorganization of a financially distressed business enterprise*, providing for its rehabilitation by adjustment of its debt obligations and equity interests.
>
> • • • •

[6] In *In re Moog*, 774 F.2d 1073 (11th Cir. 1985), the Eleventh Circuit held that a consumer debtor is eligible for relief under Chapter 11. The debtor there had no regular source of income and consequently could not qualify for Chapter 13. Her sole asset was her personal residence valued at $269,000 and subject to mortgages totalling $160,000. Her debts, all of a consumer nature, totalled $16,000. The court determined that the debtor should be permitted to proceed under Chapter 11 so that she would not be forced to liquidate her home to repay her creditors. This decision, however, is inconsistent with 11 U.S.C. § 522, which specifies the property a debtor may exempt from the bankruptcy estate. Although Section 522(d)(1) allows a debtor to exempt a portion of her equity interest in her personal residence, the Code does not authorize a wholesale homestead exemption. Nonetheless, the *Moog* court improperly sanctioned a consumer debtor's use of Chapter 11 in a manner that would defeat the limitations of Section 522(d)(1).

> Reorganization, in its fundamental aspects, involves the thannkless task of determining who should share the losses incurred by an *unsuccessful business* and how the values of the estate should be apportioned among creditors and stockholders.

S. Rep. No. 989, at 9, 10 (1978), *reprinted in* 1978 U.S. Code Cong. & Admin. News at 5795, 5796 (emphasis added).

Both the House and Senate Reports describe Chapter 11 as a single, consolidated "chapter for all business reorganizations." S. Rep. No. 989 at 9, *reprinted in* 1978 U.S. Code Cong. & Admin. News at 5795; H.R. Rep. No. 595, at 223 (1977), *reprinted in* 1978 U.S. Code Cong. & Admin. News at 6183. The House Report further explicates the basis of the Chapter 11 reorganization provisions:

> The purpose of a business reorganization case, unlike a liquidation case, is to restructure a business's finances so that it may continue to operate, provide its employees with jobs, pay its creditors, and produce a return for its stockholders. The premise of a business reorganization is that assets that are used for production in the industry for which they were designed are more valuable than those same assets sold for scrap. Often, the return on assets that a business can produce is inadequate to compensate those who have invested in the business. Cash flow problems may develop, and require creditors of the business, both trade creditors and long-term lenders, to wait for payment of their claims. If the business can extend or reduce its debts, it often can be returned to a viable state. It is more economically efficient to reorganize than to liquidate, because it preserves jobs and assets.

H.R. Rep. No. 595 at 220, *reprinted in* 1978 U.S. Code Cong. & Admin. News at 6179.

None of these considerations applies to an individual consumer debtor. A consumer debtor has no employees,

no jobs to preserve and no assets used in the business that might be more valuable on a going concern basis than when sold for scrap. Consumer debtors *are not even mentioned* in the chapter of the House Report devoted to reorganization. H.R. Rep. No. 595 at 220-262, *reprinted in* 1978 U.S. Code Cong. & Admin. News at 6179-6220.

Even more significantly, the House Report shows that the only chapters of the Bankruptcy Code that are available to consumer debtors are Chapters 7 and 13:

> The premises of the bill with respect to consumer bankruptcy are that use of the bankruptcy law should be a last resort; that if it is used, debtors should attempt repayment under chapter 13, Adjustment of Debts of an Individual with Regular Income; and finally, whether the debtor uses chapter 7, Liquidation, or chapter 13, Adjustment of Debts of an Individual, bankruptcy relief should be effective, and should provide the debtor with a fresh start.
>
> . . . .
>
> Some consumer debtors are unable to avail themselves of the relief provided under chapter 13. For these debtors, *straight bankruptcy is the only remedy that will enable them to get out from under the debilitating effects of too much debt.*

H.R. Rep. No. 595 at 118, 125, *reprinted in* 1978 U.S. Code Cong. & Admin. News at 6078-6079, 6086 (emphasis added). This passage shows beyond peradventure that consumer debtors may seek relief only under Chapters 7 and 13, and may not avail themselves of the protections of Chapter 11.[7]

To support their arguments that the legislative history reflects Congress' intent to make Chapter 11 available to nonbusiness debtors, Petitioner and Respondent cite the following passage from the Senate Report:

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[7] Chapter 11's legislative history is discussed at length in the *Wamsganz case*, 804 F.2d at 505.

> Chapter 11, Reorganization, is primarily designed for businesses, although individuals are eligible for relief under the chapter. The procedures of chapter 11, however, are sufficiently complex that they will be used only in a business case and not in the consumer context.

S. Rep. No. 989 at 3, *reprinted in* 1978 U.S. Code Cong. & Admin. News at 5789.

A similar statement is found in the House Report:

> Chapter 11, Reorganization, is primarily designed for businesses, but permits individuals to use the chapter. The procedures of chapter 11, however, are sufficiently burdensome that their use will only make sense in the business context, and not in the consumer context.

H.R. Rep. No. 595 at 6, *reprinted in* 1978 U.S. Code Cong. & Admin. News at 5968.

These statements are ambiguous at best and, when read with the legislative history just reviewed, should be interpreted to indicate that only individuals *operating businesses* may use Chapter 11 and that consumer debtors may not.[8] In any event, as these excerpts show, Congress clearly did *not* anticipate that consumer debtors would employ Chapter 11.[9]

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[8] Even Petitioner is forced to concede that the legislative history he cites to support his position is "less than conclusive." Pet. Br. at 19.

[9] Petitioner also cites a passage in the House Report discussing a provision making Chapter 13 available to sole proprietors in addition to wage earners, a change from pre-Code law. Pet. Br. at 19. The passage states that the House bill offered "small sole proprietors as well as wage earners an alternative to Chapter 11." Petitioner contends that this phrase constitutes an acknowledgement that Chapter 11 is available to persons without a business. Again, this imprecise passage is subject to varying interpretations—in context it might be read to mean only that sole proprietors, like wage earners, may use Chapter 13. Such an interpretation is preferable given the clear pronouncement in the House Report, quoted above, that only Chapters 7 and 13 are available to consumer debtors. Even if the conclusion is that the passage Petitioner quotes is inconsistent with the House statement we rely on, we submit that the far more definitive statement we cite should be given greater weight.

IV. OTHER BANKRUPTCY CODE PROVISIONS, INCLUDING THOSE IN CHAPTER 13, DEMONSTRATE THAT CHAPTER 11 WAS NOT INTENDED TO PROVIDE RELIEF TO CONSUMER DEBTORS

Chapter 13 permits an individual debtor to retain his assets and repay his creditors out of future disposable income. 11 U.S.C. § 1306. However, 11 U.S.C. § 303(a) prohibits the filing of an involuntary Chapter 13 petition against an individual consumer debtor. Involuntary petitions are not permitted because Chapter 13 "only works when there is a willing debtor who wants to repay his creditors." S. Rep. No. 989 at 32, *reprinted in* 1978 U.S. Code Cong. & Admin. News at 5818. Similarly, creditors are not permitted to force a voluntary Chapter 13 debtor into an involuntary repayment plan because an unwilling debtor is unlikely to cooperate in such a plan. 11 U.S.C. § 1321; H.R. Rep. No. 595 at 123, *reprinted in* 1978 U.S. Code Cong. & Admin. News at 6084.

In contrast, involuntary petitions may be filed to force a debtor into a Chapter 11 proceeding. 11 U.S.C. § 303(a). Moreover, if a Chapter 11 debtor fails to file a reorganization plan in a timely manner or to file an acceptable plan, any party in interest may propose a plan. 11 U.S.C. § 1121(c). If Chapter 11 is construed to apply to individual consumer debtors, such debtors could be forced into involuntary Chapter 11 proceedings and reorganization plans.

A putative Chapter 11 consumer debtor, however, would be similarly situated to a Chapter 13 debtor and would be no more likely to cooperate in an involuntary reorganization plan than a Chapter 13 debtor would be to cooperate in an involuntary repayment plan. It thus

makes no sense to construe Chapter 11 to encompass consumer debtors and to subject them to involuntary reorganization plans.

Examination of the reorganization plan Petitioner has proposed emphasizes this point. Petitioner's plan would have him borrow $25,000 to pay his creditors what they would receive if his sole asset—his IEC stock—was sold in liquidation. But surely, even if his creditors could force him into Chapter 11, they could not compel him to incur further debt, as he proposes, or essentially do anything else to effectuate payment except liquidate his IEC stock. Similarly, in *In re Moog*, 774 F.2d 1073 (11th Cir. 1989)—a case heavily relied on by both Petitioner and Respondent—the creditors could not have forced the petitioner to enter into a viable repayment plan.[10]

Pursuant to 11 U.S.C. § 1307(d), a court may convert a case under Chapter 13—which also applies to certain business debtors—to a Chapter 11 case at the request of any party in interest or the trustee. The House Report counsels that a court shall "excercise its sound discretion in determining whether to grant the request, based on *the nature of the debtor's business* and other similar factors." H.R. Rep. No. 595 at 428, *reprinted in* 1978 U.S. Code Cong. & Admin. News at 6384. Thus, the House clearly contemplated that a Chapter 13 case could be converted to a Chapter 11 case only where the debtor was engaged in an on-going business.

Finally, we observe that Chapter 13 is available only to those consumer debtors who, unlike Petitioner, have regular income and unsecured debts of less than $100,000. 11 U.S.C. § 109(e). Why Congress imposed this limitation on consumer debtors is not wholly clear,[11] but it

[10] Even the *Moog* decision notes that Chapter 11 is "primarily aimed at business debtors." 774 F.2d at 1074.

[11] The limitation, in part, was intended "to prevent sole proprietors with large businesses from abusing creditors by avoiding

seems fair to conclude that Congress intended that consumer debtors with such large debts should be limited to liquidation and should not be allowed to propose and effect either a repayment or reorganization plan.

V. PETITIONER'S ARGUMENT BASED ON FORMER PROVISIONS OF THE BANKRUPTCY ACT IS UNPERSUASIVE

Petitioner asserts that the practice under Chapter XI of the Bankruptcy Act—one of the predecessor provisions to the current Chapter 11—permitted consumer debtors to reorganize. Petitioner contends that, because the legislative history does not indicate Congress's intent to depart from this practice, "it should be presumed that Congress intended to continue that practice in the codification of Chapter 11 and that Congress intended that Chapter 11 be made available to nonbusiness individual debtors." Pet. Br. at 13.

The legislative history of the Bankruptcy Code, however, is devoid of any congressional recognition of a "practice" permitting consumer debtors to reorganize under former Chapter XI of the Bankruptcy Act. Indeed, the House Report expressed the concern that the Bankruptcy Act did not provide an effective remedy to consumer debtors who were often forced to liquidate because the restrictions on relief and limitations on eligibility found in former Chapter XIII discouraged or precluded them from attempting to negotiate repayment plans with creditors. There is no mention of former Chapter XI as an alternative available to consumer debtors. H.R. Rep. No. 595 at 116-125, *reprinted in* 1978 U.S. Code Cong. & Admin. News at 6076-6086. Rather, Chapter XI was identified as one of "four chapters [designed] for the reorganization of businesses." H.R. Rep.

Chapter 11." H.R. Rep. No. 595 at 119, *reprinted in* 1978 U.S. Code Cong. & Admin. News at 6080. This does not explain the limitation as to consumer debtors who do not operate a business.

No. 595 at 221, *reprinted in* U.S. Code Cong. & Admin. News at 6181.

Chapter VIII (Section 77) of the Bankruptcy Act, dealt with railroad reorganizations, Chapter X provided for financial restructuring of public corporations, Chapter XI provided "for arrangements and compositions for corporations, partnerships and individuals," and Chapter XII contained "the procedures for arrangements for noncorporate entities involved in real estate." H.R. Rep. No. 595 at 221, *reprinted in* 1978 U.S. Code Cong. & Admin. News at 6181. Chapter 11 of the Bankruptcy Code represents the consolidation of these chapters into a "single chapter for all business reorganizations." S. Rep. No. 989 at 9, *reprinted in* 1978 U.S. Code Cong. & Admin. News at 5795.[12] Nothing in the legislative history specifically indicates that this consolidation was intended to provide a benefit for consumer debtors. On the contrary, as remarked above (see Part III), the House Report clearly states that consumer debtors may seek relief only under Chapters 7 and 13.

While contending that consumer debtors could use former Chapter XI, Petitioner concedes that they were expressly excluded from relief under former Chapter X. Pet. Br. at 14. Thus, Congress would have been required to choose between conflicting provisions in consolidating the business reorganization chapters. *See, United Savings Ass'n. of Texas v. Timbers of Inwood Forest Assoc., Ltd.*, 484 U.S. 365, 380-381 (1988) (in replacing Chapters X, XI and XII with a single business reorganization chapter, "Congress would have been faced with the choice between adopting the rule from Chapters X and XII or

[12] The Senate Report states that "Chapter 11 replaces chapters X, XI and XII of the Bankruptcy Act[.] Chapter 11 also includes special provisions for railroads in view of the impact of regulatory laws on railroad debtors and replaces section 77 of the Bankruptcy Act." S. Rep. No. 989 at 9, *reprinted in* 1978 U.S. Code Cong. & Admin. News at 5795.

the asserted alternative rule from Chapter XI").[13] There is no basis for "presuming" that consumer debtors are eligible for relief under Chapter 11 simply because they were eligible for relief under one, but not all, of the predecessor provisions. *See, Timbers of Inwood Forest*, 484 U.S. at 381. Indeed, given the legislative history discussed above—particularly the statement in the House Report demonstrating that Chapters 7 and 13 are the only chapters available to consumer debtors—the conclusion must be that Congress did not intend that consumer debtors be given relief under Chapter 11.

VI. POLICY CONSIDERATIONS COUNSEL AGAINST ALLOWING CONSUMER DEBTORS TO USE CHAPTER 11

As the Senate and House Reports articulate, Chapter 11's purpose is to permit business debtors to reorganize and restructure their debts in order to return to a viable state. Towards this end, the assets used in the business's operation are preserved to the extent necessary to effectuate reorganization, and the proceeds produced by those assets are used to repay creditors. Permitting businesses to reorganize promotes the public interest in preserving jobs and protecting investors. No such pur-

[13] In *Timbers of Inwood Forest*, petitioner argued that 11 U.S.C. § 362(d)(1) entitles an undersecured creditor to postpetition interest. In support, he contended that former Chapter XI gave an undersecured creditor relief from the automatic stay provision by permitting him to foreclose and that Congress would not have withdrawn this right without any indication of intent to do so in the legislative history unless it provided an adequate substitute in the form of interest during the stay. This Court rejected that argument, observing that, even assuming an undersecured creditor had an absolute entitlement to foreclosure under former Chapter XI, no such right existed under former Chapters X and XII. The Court concluded that nothing could be read into the silence of the legislative history because, in consolidating the chapters, Congress could have adopted the approach of Chapter XI or the alternative approach of Chapters X and XII. *Timbers of Inwood Forest*, 484 U.S. at 380-381.

pose is served by allowing an individual nonbusiness debtor to proceed under Chapter 11. A consumer debtor has no business-related assets capable of generating income and no employees or investors to be protected.

Moreover, the earnings from services performed personally by an individual Chapter 11 debtor after commencement of the case are exempt from the bankrupt estate. 11 U.S.C. § 541(a)(6); *In re Fitzsimmons*, 725 F.2d 1208, 1211 (9th Cir. 1984). Thus a consumer debtor invoking Chapter 11 would be able to shield both his disposable income and his non-exempt personal assets from his creditors. To allow this, however, would provide such a debtor far more protection than Chapter 13 —which does not protect disposable income—or Chapter 7—which does not protect non-exempt personal assets. There certainly is no indication that Congress intended to provide a consumer debtor such expansive protection through Chapter 11. Indeed, the legislative history described above establishes the contrary.

Respondent contends that consumer debtors should be permitted to obtain relief under Chapter 11 because Congress prefers reorganization over liquidation. Resp. Br. at 14-17. In support of this contention, Respondent cites 11 U.S.C. § 706(a) and 707(b). Pursuant to Section 706(a), a debtor is given a one-time, absolute right to convert a Chapter 7 liquidation case to a case under Chapters 11, 12 or 13. Respondent asserts that this conversion right reflects a policy favoring reorganization over liquidation. This analysis is flawed because a debtor under Chapter 11, 12 or 13 is given the same right to convert a reorganization case to a Chapter 7 liquidation case. *See* 11 U.S.C. §§ 1112(a), 1208(a) and 1307(a). These conversion rights no more reflect a policy favoring reorganization than a policy favoring liquidation.

Section 707(b) authorizes a court to dismiss a Chapter 7 liquidation case filed by a consumer debtor if granting of relief would constitute a "substantial abuse of the

provisions of this chapter." As observed, courts have invoked this provision to dismiss Chapter 7 consumer cases where the debtor has the financial resources to repay his creditors. *In re Krohn*, 886 F.2d 123 (6th Cir. 1989); *In re Walton*, 866 F.2d 981 (8th Cir. 1989); *In re Kelly*, 841 F.2d 908 (9th Cir. 1988). Rather than manifesting a policy favoring reorganization over liquidation as Respondent contends (Resp. Br. at 14), this provision simply authorizes courts to *dismiss* and deny a fresh start to a consumer debtor whose financial situation does not warrant the discharge of his debts in exchange for the liquidation of his assets. *In re Krohn*, 886 F.2d at 126-127.

Petitioner asserts that permitting consumer debtors to use Chapter 11 is consistent with the structure of the Bankruptcy Code, which is designed to provide debtors alternative remedies. Pet. Br. at 20-27. Barring consumer debtors from using Chapter 11, however, does not generally deny them a choice of remedies. Consumer debtors normally are eligible to proceed under either Chapter 7 or Chapter 13. The fact that consumer debtors who do not meet the Chapter 13 eligibility requirements may be forced to liquidate under Chapter 7 is no reason to permit them to file under Chapter 11. "[B]ankruptcy is not the only method available to a debtor for the adjustment of his relationship with his creditors." *United States v. Kras*, 409 U.S. 434, 445 (1973). Moreover, Congress obviously made a policy decision that consumer debtors with debts exceeding certain limits or who had no regular income *should not* be able to utilize Chapter 13. It also is reasonable to assume that Congress decided that eligible consumer debtors should use Chapter 13—which requires use of disposable postpetition income to pay their debts—and not Chapter 11, which would allow protection of both non-exempt assets *and* postpetition income earned by personal services.[14]

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[14] 11 U.S.C. § 541(a)(6).

Finally, we must note the hardships on bankruptcy and higher courts that a ruling allowing consumer debtors to reorganize under Chapter 11 could entail. The courts might well be flooded with suspect, jerry-built plans, which eventually would prove unworkable, from consumer debtors who seek to use Chapter 11 to protect both their non-exempt assets and their postpetition income (which Chapter 13 does *not* safeguard). The courts evidently have enough to do in ruling on Chapter 11 *business* reorganization plans, most of which fail.[15] To impose an additional burden on the courts does not seem warranted, especially when most consumer debtors can avail themselves of the debt restructuring provisions of Chapter 13.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the Eighth Circuit Court of Appeals.

Respectfully submitted,

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[15] According to Respondent, almost 90 percent of Chapter 11 reorganizations fail. Resp. Br. at 18, n.10.